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IN THE

Supreme Court of the United States

October Term, 1990

JOE AULSTON and LOLA AULSTON; HOWARD L. BARTLEY and ELSIE BARTLEY; VIRGINIA BASSETT; ROGER A. BIGLER, Trustee; BARBARA BURKE, Trustee for PAUL WILSON Estate;
Petitioners,

(Additional Petitioners are listed inside front cover.)

vs.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; MANUEL LUJAN, JR., in his Official capacity as Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; CY JAMISON, in his official capacity as Director of the U.S. Bureau of Land Management; H. ROBERT MOORE, in his official capacity as Colorado State Director of the Bureau of Land Management,
Respondents,

and

SHELL WESTERN E & P, Inc.; CONOCO, INC.; VINCENT J. DUNCAN; RAYMOND T. DUNCAN; ELECTRA INVESTMENT; SYNERGY EXPLORATION, CO.; GULF OIL CORP.; MOBIL PRODUCING TEXAS/NEW MEXICO; MCO RESOURCES, INC.; ESTATE OF WALTER DUNCAN; TIDELANDS ENERGY CO.; UNIVERSAL RESOURCES CORP.; LENDON CO.; DUNCAN ENTERPRISES, INC.; JUSTIN R. MEYER; BARBARA L. MEYER; PHILLIPS OIL CO.,
Intervenors-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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———

Petitioners,

Questions Presented for Review

1. When determining the meaning of legal documents which incorporate preexisting statutory language, may courts properly defer to agency interpretations of the underlying statute that are made *after* the documents are executed?

2. Do land patents which reserve "oil and gas" interests to the United States pursuant to the Agricultural Entry Act of 1914 also reserve to the government deposits of carbon dioxide found beneath the patented land?

Statement Pursuant to Rule 29.1

All parties to this proceeding are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

Opinions Below

The Opinion and Judgment of the Court of Appeals (Pet. App. 1a-39a) is reported at 915 F.2d 584 (10th Cir. 1990). The Opinion of the District Court, No. 87-F-1144 (D. Colo. Aug. 4, 1988) (Pet. App. 40a-44a) is unreported. The Opinion of the Interior Board of Land Appeals in *Irving L. Norton*, I.B.L.A. No. 88-22 (Nov. 27, 1987) (Pet. App. 64a) is unreported. The Opinion of the Interior Board of Land Appeals in *Robert D. Lanier* (Pet. App. 45a-63a) is reported at 93 I.D. 66 (1986).

Jurisdictional Statement

On September 20, 1990, the United States Court of Appeals for the Tenth Circuit entered judgment affirming the decision of the United States District Court for the District of Colorado (Pet. App. 1a-39a).

On December 1, 1990, Justice White extended the time for filing a petition for a writ of certiorari to and including January 18, 1991, and on January 9, 1991, again extended the time for filing to and including February 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1988).

Statutory Provisions In Case

The Agricultural Entry Act of 1914, ch. 142, 38 Stat. 509 (codified as amended at 30 U.S.C. §§121-25 (1988)), provides in relevant part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same; but no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres: *Provided,* That all applications to locate, select, enter, or purchase under this section shall state that the same are made in accordance with and subject to the provisions and reservations of this Act.

Statement of the Case

Petitioners, Colorado ranchers and farmers, seek review of a decision by a panel of the Court of Appeals for the Tenth Circuit. The judgment below, which affects the title to carbon dioxide deposits worth more than $500,000,000.00, raises questions concerning (1) the retroactive effect on vested rights of judicial deference to administrative interpretations of statutes and (2) the proper construction of the Agricultural Entry Act of 1914 and numerous land patents which incorporate its language.

Petitioners own land in two Colorado counties. This land contains portions of the McElmo Dome, a geologic formation which holds a large and valuable deposit of carbon dioxide ("CO2"). The CO2 beneath petitioners' land is over 99 percent pure, containing only insignificant traces of hydrocarbons (about .001).

Petitioners own their land as successors in interest to patentees who took title from the federal government between 1922 and 1962, subject to the provisions and limitations of the Agricultural Entry Act of 1914, ch. 142, 38 Stat. 509 (codified as amended at 30 U.S.C. §§121-25 (1988)) ("1914 Act"). The 1914 Act permitted homestead entry onto public domain lands which had previously been withdrawn from homestead entry because they were thought to contain "phosphate, nitrate, potash, oil, gas, or asphaltic minerals," 30 U.S.C. §121. However, the statute also required that any patents for such lands contain reservations to the United States "of the deposits [of the enumerated resources] on account of which the lands so patented were withdrawn

or classified or reported as valuable ...." *Ibid.*[1] Pursuant to this statute, all of petitioners' patents contain reservations of "oil" and "gas."

In 1979, seventeen years after the last of petitioners' patents were issued, the Regional Solicitor for the Department of the Interior stated for the first time that the United States owned the CO2 deposits under the terms of the 1914 Act and the "oil and gas" reservations in petitioners' patents.[2] *See* Memorandum from the Regional Solicitor, Denver, Department of the Interior, to the State Director of the Bureau of Land Management (July 12, 1979). After a procedural detour,[3] petitioners

[1] The statute reads in relevant part:

> Lands withdrawn or classified as phoshate, nitrate, potash, oil, gas or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable ....

30 U.S.C. §121.

[2] The vast majority of the patents at issue reserve to the government simply "oil and gas," although a few also reserve minerals such as potash or sodium. Pet. App. 3a. The more extensive reservations appear in a number of patents executed after 1933, when the Agricultural Entry Act was amended to permit reservations of sodium and sulfur. *See* Act of Mar. 4, 1933, ch. 278, 47 Stat. 1570 (codified at 30 U.S.C. §124 (1988)). Because it illustrates more sharply the error of the Interior Department and the Court of Appeals, we describe the reservations using the more common "oil and gas" language.

[3] In 1980, petitioners sought review of the Regional Solicitor's decision in district court, asserting claims under the Administrative Procedure Act, 5 U.S.C. §§701-706 (1988), and the "Little Tucker Act," 28 U.S.C. §1346(a)(2) (1988). The District Court dismissed the APA claim for failure to exhaust administrative remedies and the "Little Tucker Act" claim for lack of jurisdiction. *See Ives v. United States*, No. 80-K-705, slip op. at 2-3 (D. Colo. Mar. 25, 1981).

filed an application with the Interior Department for a disclaimer of interest under 43 U.S.C. §1745 (1988), which authorizes the Department to issue what amounts to a quitclaim deed whenever the Secretary of the Interior determines that the United States has no interest in property. Interior Department regulations permit appeal of an adverse ruling of the Secretary to the Interior Board of Land Appeals ("IBLA"), *see* 43 C.F.R. §1864.4 (1990), whose ruling in turn constitutes reviewable agency action.

In 1986 and 1987, a quarter-century after the last of their patents were executed, petitioners obtained final rulings from the IBLA, which held that the "oil and gas" reservations in petitioners' deeds gave itself ownership not just of petroleum and natural gas, but also of pure CO2 deposits located beneath petitioners' property. *See Irving L. Norton,* I.B.L.A. 88-22 (Nov. 27, 1987); *Robert D. Lanier,* 93 I.D. 66 (1986). After another procedural detour,[4] petitioners sought review of the IBLA's decisions in the Colorado District Court pursuant to 28 U.S.C. §1331 (1988). On August 4, 1988, the District Court affirmed the IBLA decisions, holding that the principles of *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984), required it to defer to the Interior Department's view that the CO2 deposits were within the reservations of "oil and gas" interests. *See Aulston v. United States,* No. 87-F-1144, slip op. at 4 (D. Colo. Aug. 4, 1988).

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[4] Petitioners initially sought review of the IBLA decision in the Claims Court, seeking money damages for an unconstitutional taking of property. *See* 28 U.S.C. §1491 (1988). The Claims Court held that it could not address the takings issue until title to the property was first adjudicated in an Article III district court. *See Aulston v. United States,* 11 Cl. Ct. 58 (1986). Its holding was affirmed by the Court of Appeals for the Federal Circuit. *See Aulston v. United States,* 823 F.2d 510 (Fed. Cir. 1987).

On September 20, 1990, the Tenth Circuit affirmed the District Court's ruling. Again invoking *Chevron*, the court concluded: (1) that the 1914 Act did not speak directly to the precise question at issue—namely, whether CO2 is within the range of interests subject to reservation under the 1914 Act and actually reserved in petitioners' land patents, Pet. App. 23a; (2) that the Interior Department had no previous occasion to construe the relevant language in the 1914 Act, Pet. App. 23a-24a, 26a; (3) that the Department's 1986 interpretation of the 1914 Act did not conflict with prior agency interpretations of similar terms in related legislation, Pet. App. 23a-29a; and finally (4) that the agency's interpretation of the 1914 Act to include CO2 as a reserved interest was "permissible," Pet. App. 29a, and " 'reasonable in light of the statutory purpose.' " Pet. App. 35a (quoting *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455 (1978)). The court specifically noted petitioners' argument "that the determinative administrative interpretations of a statute vesting property rights are those contemporaneous with the passage of the Act," Pet. App. 24a, but it rejected the argument without discussion.

REASONS FOR GRANTING THE WRIT

There are two reasons why this case merits plenary review. First, the Court of Appeals has promulgated a new and damaging rule for judicial review of agency interpretations of statutes. The new rule is plainly wrong, has the immediate effect of unsettling and imperiling titles to nearly one million acres of land, and will unpredictably disrupt vested legal rights in countless other contexts.

The Tenth Circuit's decision greatly expands the principle of administrative deference set forth in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), to govern issues of interpretation where deference has no place. Under *Chevron*, when a federal agency interprets its governing statutes or regulations, reviewing courts ask only whether the agency's interpretation is permissible or reasonable, not whether it is the correct or best interpretation. *Id.* at 843. Once a statute or regulation has actually vested title to property, however, *subsequent* agency interpretations, however permissible or reasonable, cannot undo the past. Today's deference cannot alter yesterday's vested legal rights.

This case involves land patents executed between 1922 and 1962. All of these patents contained reservations incorporating language from the Agricultural Entry Act of 1914, which in turn was first definitively construed by the Department of the Interior in 1986. The Court of Appeals, applying *Chevron*, concluded that the Interior Department's 1986 interpretation of the 1914 Act, whose language had been incorporated decades earlier into petitioners' "oil and gas" reservations, was "permissible." *On that basis*, the court awarded the government title to the carbon dioxide.

This approach was clear error. Agency interpretations of the 1914 statute made *after* the statute's language was incorporated into other legal documents, such as land patents, cannot possibly affect the meaning of those other documents. The question in such cases is not whether an agency interpretation is "permissible" or "reasonable" but which interpretation of the statute is the better one. Otherwise, there can be no security in a landowner's title or in any other vested rights subject to reinterpretation in this fashion.

The Court of Appeals' faulty methodology leads to absurd and far-reaching consequences. It is well established that court affirmance of an agency decision as permissible under *Chevron* leaves the agency free to reinterpret the statute in other permissible ways at later times. In the present case, it is apparent that the Court of Appeals would have upheld as permissible an agency interpretation of the 1914 Act establishing that "oil and gas" referred only to fuel gas and not to the carbon dioxide. Thus, if the Interior Department chooses to reverse its 1986 view in the future, the court should, on the standard of "permissibleness," uphold that result and decide that petitioners do, after all, own the carbon dioxide under their land. Title or other vested legal rights, however, cannot keep shifting in this manner—so that title is in the government today, the petitioners tomorrow, and perhaps the government again next year—depending on the agency's current "permissible" interpretation of the statute. Nor can it be the case that private persons who enter upon land under government patents, or who enter into contracts with the government, can have their entirely legitimate understandings of their rights defeated 60 or 70 years later by a new agency interpretation that falls within the range of the "permissible."

This is precisely the error made by the Court of Appeals, whose decision stands as the law of the Tenth Circuit. In view of the Tenth Circuit's critical role in land patent disputes, the erroneous new rule is of enormous practical and legal consequence. Review by this Court is plainly warranted.

Second, whether or not it was proper for the court to give weight to the agency's interpretation decades after the statutory meaning was incorporated into legal instruments, the court's acceptance of the agency's views deformed the 1914 Act and produced a result contrary to the clear and unambiguous meaning of the statute. As in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983), in which this Court granted review of a Tenth Circuit decision construing reservations in land patents "[i]n view of the importance of the case to the administration of the more than 33 million acres of land patented under the [Stock-Raising Homestead Act of 1916]." *id.* at 42, this case is crucial to the administration of the nearly 5.5 million acres of land subject to federal "oil and gas" reservations—hundreds of thousands of acres of which are located in the Tenth Circuit.[5] The panel's misconstruction of the statute is of enormous importance and warrants review.

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[5] As of 1948, the six states composing the Tenth Circuit contained 951,249 acres of land subject to oil and gas reservations (including reservations of oil, gas, and other minerals), amounting to almost forty percent of the land subject to such reservations. *See* Bureau of Land Management, U.S. Dep't of the Interior, Public Land Statistics 1989, at 16. Since 1948, an additional 2,973,804 acres of land nationwide have been patented with similar reservations, though Bureau of Land Management statistics do not break down these more recent reservations by state. *See id.* at 17.

I. When Construing Legal Documents Which Incorporate Statutory Language and Meaning, Courts May Not Defer to Agency Interpretations of the Underlying Statute That Are Made *After* the Documents Are Executed.

A. The Court of Appeals Wrongly Allowed the Interior Department's 1986 Interpretation of the 1914 Act to Affect Its Construction of Documents Which Had Vested Titles to Property Decades Earlier.

Having first decided (erroneously, as we demonstrate in Part II) that the 1914 Act is ambiguous on the question whether petitioners' "oil and gas" reservations include CO2 or only fuel gas found in conjunction with oil, the Court of Appeals held:

> We now must consider whether the Department of the Interior's construction of the 1914 Act is a permissible one. To affirm the Department's decision, we "need not conclude that the agency construction was the only one it permissibly could have adopted," *nor must it accord with "the reading [we] would have reached if the question initially had arisen in a judicial proceeding."*

Pet. App. 29a (quoting *Chevron*, 467 U.S. at 843 n.11) (emphasis added) (citation omitted). The court also observed that "[u]ntil the inception of this dispute, the Department of the Interior had no occasion to determine explicitly whether carbon dioxide is 'gas' within the meaning of the 1914 Act." Pet. App. 23a-24a. Thus, the agency's 1986 interpretation came retroactively to determine titles as much as 70 years old under the 1914 Act.

This novel application of *Chevron* makes no sense whatsoever. The Interior Department is, of course, entitled to deference when it construes provisions of the 1914 Act. A reasonable agency interpretation of the

statute in 1986 therefore establishes the Act's meaning for subsequent events, and may well be entitled to deference as to the scope of titles taken *after* that interpretation was promulgated. But no sensible principle of administrative review permits that interpretation retroactively to be read into documents which long ago vested rights in individuals or the government. Those rights were fixed when the documents were executed, and only agency interpretations contemporaneous with their execution can bear on their meaning.

B. The Court of Appeals' Novel Deference Rule Destroys the Stability of Land Titles Subject to the 1914 Act.

The Court of Appeals' failure to grasp the significance of the "timing factor" in deference analysis leads to absurd consequences and destroys the stability of land titles and other vested rights. It injects federal agencies into the state land title process decades after patents are issued.

When deference is due an agency interpretation of a statute, "reasonableness" or "permissibleness" is the criterion of review, not correctness. Often that will mean that an interpretation could go either way and be upheld by a reviewing court. The agency may even later change its interpretation and again be upheld. *See, e.g., NLRB v. Bufco Corp.*, 899 F.2d 608, 610-11 (7th Cir. 1990); *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 861 F.2d 1124, 1129-31 (9th Cir. 1988) (*en banc*).

Chevron itself illustrates the point. This Court reversed the judgment of the D.C. Circuit because the Environmental Protection Agency's view that the term "stationary source" in the Clean Air Act could include

entire factories and not just each outlet for pollution was reasonable. Should the EPA now reverse its position, opposing counsel could not win simply by pointing to the prior *Chevron* decision. The question, once more, would involve the range of permissible interpretations. But no statute can take on such chameleon-like meanings once it has been incorporated into a document giving title. Otherwise, every time the Interior Department again changed its view of the 1914 Act, ownership of the CO2 would abruptly shift from petitioners to the government or vice versa.

This "badminton" theory of title is obviously untenable: the CO2 belongs either to petitioners or to the government. The title was vested when the patents were issued, and it was vested according to the statute's meaning at that time.

C. The Decision Threatens the Stability of Land Titles Under Other Patent Statutes, As Well As Numerous Other Forms of Vested Rights.

The Court of Appeals' willingness to grant deference to the Interior Department's noncontemporaneous interpretation of the 1914 Act was not merely plain error affecting thousands of acres and hundreds of millions of dollars in this case.[6] As the law of the Tenth Circuit, the panel's erroneous approach would likewise govern titles under other important statutes, such as the Homestead Act of 1862, ch. 75, 12 Stat. 392 (codified as amended at 43 U.S.C. §§161-302 (1988)), and the Stock-Raising Homestead Act of 1916, ch. 2, 39 Stat. 862 (codified as

[6] Petitioners represent 15,742.01 of the 203,234.26 acres in the McElmo Dome unit, *see Robert D. Lanier*, Pet. App. 47a n.2, giving them a 7.75 percent interest in the unit's 8.4 trillion cubic feet of recoverable CO2 reserves. In 1982, when the McElmo Dome unit was formed, the price of CO2 was 80 cents per thousand cubic feet. At that price, petitioners' interest in the deposit is worth more than $520,000,000.00.

amended at 43 U.S.C. §§291-99 (1988)).[7] Furthermore, apart from these entirely foreseeable consequences for land patents, the panel's rule of retroactive deference will apply to other legal documents incorporating statutory or regulatory language. For example, Title 48 of the Code of Federal Regulations contains numerous standard provisions for government procurement contracts. *See* 48 C.F.R. Pt. 52 (1989). Presumably, after-the-fact agency interpretations of these provisions will also reassign the rights of individuals if the agency's subsequent interpretations are within the range of the "permissible," even though not what the court would have decided had it approached the task of statutory or regulatory construction without deference to the agency. The mischief, both actual and potential, created by the panel's new approach to administrative review is thus not only pernicious but sweeping.

D. The Court of Appeals Should Have Sought the *Correct* Meaning of the 1914 Act.

The Court of Appeals' conclusion in this case that the Interior Department's 1986 interpretation of the word "gas" in the 1914 Act was "permissible" had no relevance whatever to the meaning of the 1914 statute when it was enacted or when its meaning was incorporated into the "oil and gas" reservations in petitioners' land patents. The Court of Appeals should have sought the correct or better meaning of the 1914 Act and decided who had title to the CO2 beneath petitioners' lands on that basis. The error below is clear, it is serious, and, we submit, the judgment requires review and reversal by this Court.

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[7] Both statutes were repealed by the Federal Land Policy and Management Act of 1976, 90 Stat. 2743 (codified at 43 U.S.C. §§1701-82 (1988)), but the statutes retain force because "[e]xisting patents were unaffected by the repeal." *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 38 n.1 (1983).

II. Whether Or Not Deference Is Given to the Interior Department's 1986 Views, the 1914 Act Clearly and Unambiguously Leaves Petitioners With Title to the CO_2 Beneath Their Lands.

In addition to the foregoing problems concerning the application of *Chevron* in contexts where statutory language and meaning is incorporated into other legal documents, there is another, and equally compelling, reason to grant certiorari in this case. Simply put, the Department of the Interior's sweeping construction of the word "gas," as it is used in the 1914 Act and petitioners' patents,[8] is contrary to the statute's plain meaning. *See Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"). Natural gas is all that *could have been* reserved by the government under the statute, and natural gas is all that *was* reserved by the government in petitioners' patents. The Court of Appeals' contrary ruling affects a vast quantity of land, and it stands as the law of a circuit with particular responsibility for adjudicating land patent disputes.

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[8] We repeat the relevant language from the statute:

> Lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable . . . .

30 U.S.C. §121.

A. CO2 Was Not a Mineral "On Account of Which" Petitioners' Lands Were Withdrawn From Homestead Entry, and It Therefore Could Not Have Been Reserved Under the 1914 Act.

We will shortly argue that the term "gas," as it is used in the 1914 Act, encompasses only natural (or fuel) gas. Even if that argument is incorrect, however, the statutory text and the agency's own administrative findings irrefutably demonstrate that petitioners' patents *did not in fact* reserve to the government anything other than oil and natural gas.

The text of the 1914 Act permits the government to reserve only "*the deposits on account of which the lands were withdrawn or classified or reported as valuable* . . . ." 30 U.S.C. §121 (emphasis added). Thus, the 1914 Act contains two separate limitations on the government's power to reserve resources beneath patented land. First, the reserved minerals must be within the statute's enumeration of "phosphate, nitrate, potash, oil, gas, or asphaltic minerals." Second, the reserved minerals *must have been the specific reason why the specific patented land was originally withdrawn from homestead entry.* For example, if land was withdrawn from entry (or classified or reported as valuable) because it was believed to contain phosphate deposits, then the government's reservation under the 1914 Act could lawfully extend only to phosphate. A reservation of "oil and gas" with respect to that land would be blatantly unlawful.

The point is dispositive in this case because the IBLA specifically found "*no evidence* that the land involved herein was withdrawn, classified, or reported as valuable on account of carbon dioxide." Pet. App. 53a n.6

(emphasis added). It ineluctably follows that CO2 *could not have been* reserved in petitioners' patents even if it was within the enumeration of resources in the 1914 Act.

The agency's reason for rejecting this claim, which was adopted without meaningful elaboration by the Court of Appeals, Pet. App. 17a-18a, is incomprehensible. After noting the absence of any evidence indicating that petitioners' lands were withdrawn "on account of" CO2 deposits, the agency continued: "However, the mineral reservations clearly embrace the term 'gas.' We must, therefore, presume that the land was either withdrawn, classified, or reported as valuable on account of 'gas.' " Pet. App. 53a n.6.

Quite so. But given petitioners' longstanding concession that their land was originally withdrawn from homesteading "on account of" suspected *petroleum* deposits, what obviously follows from the inclusion of "gas" in the reservations is that the government could, and did, reserve to itself *the natural (fuel) gas that typically accompanies oil deposits.* The point was clear to everyone at the time of enactment of the 1914 Act,[9] and we simply cannot fathom how the agency and the Court of Appeals could have concluded otherwise.

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[9] *See* United States Geological Survey Bulletin 623, Petroleum Withdrawals and Restorations Affecting the Public Domain 58 (1916) (emphasis added):

> None of the withdrawal orders [removing land from homestead entry for "oil"] have specified natural gas [as a reason for such withdrawal], although it is mentioned in some of the recommendation letters transmitting the orders. The question was raised whether gas should be reserved to the United States in patents issued for withdrawn lands under the act of July 17, 1914 [*i.e.*, the 1914 Act]. The following letter

(Footnote continued on following page.)

B. CO2 Is Not "Gas" Within the Meaning of the 1914 Act or Petitioners' Patents, Which Refer Only to Natural Gas.

Petitioners have contended throughout this case that the 1914 Act clearly permits reservation of two classes of minerals: fertilizer minerals ("phosphate, nitrate, potash") and fuel minerals ("oil, gas, or asphaltic minerals"). The government, on the other hand, has claimed, and the Court of Appeals has accepted as plausible, that the statute permits reservation of three classes of minerals: fertilizer minerals ("phosphate, nitrate, potash"), fuel minerals ("oil ... or asphaltic minerals"), and all gaseous substances of any nature ("... gas ..."). The text of the statute simply will not support the latter reading.

The statute identifies the land subject to reservation as "lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits ...." 30 U.S.C. §121. That wording makes sense only if "gas" is read as a fuel mineral, *i.e.*, natural gas, of the sort that is typically found associated with oil. On that understanding, which

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(Footnote continued from preceding page.)

> [dated April 26, 1915, from the Assistant Secretary of the Interior to the Comissioner of the General Land Office] resulted: ... I enclose herewith communication from the Director of the Geological Survey, with respect to patents ... for lands included within the limits of petroleum withdrawals, act July 17, 1914 (38 Stat., 509) .... As stated by the Director, there is such an intimate association and relation between oil and *natural gas* that lands withdrawn because of their oil deposits were also withdrawn because of their gas content ... [and] every oil withdrawal constitutes a report that the lands withdrawn are also valuable for their deposits of gas .... [T]he reservation inserted into the patents above described should mention both oil and gas.

is commonplace when the terms "oil" and "gas" are conjoined,[10] the statute contains two natural groupings: the first three enumerated resources are each fertilizer minerals, and the last three enumerated resources are each fuel minerals. This is exactly what one would expect from drafters who intended to cover minerals within those two classes.[11]

It is far more difficult to understand why a drafter would write the statute this way if he or she intended to convey the meaning the government and the Court of Appeals have forced on the words. One would have to believe that the drafter first listed three fertilizer minerals, then one fuel mineral, then all gas of any kind, and then one more fuel mineral. It is very unlikely that a drafter would split the two fuel minerals apart in order to put a wholly different classification between them. To convey the meaning accepted as plausible by the Court of Appeals, the drafter would, at a minimum have expressed Congress' intention as follows: "phosphate, nitrate, potash, oil, asphaltic minerals, and all gas." In fact, since it was well understood that in these matters "gas" meant natural or fuel gas, particularly when used in direct conjunction with "oil," the drafter, to be safe, would have written "and all gas of any kind."

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[10] *See* H. Williams & C. Meyers, Manual of Oil and Gas Terms 298 (1981) ("In the oil and gas industries, [gas] means natural gas").

[11] Just two months after the passage of the 1914 Act, Congress included a letter from First Assistant Secretary of the Interior, A. A. Jones, in S. Rep. No. 806, 63rd Cong., 2d Sess., Report to Accompany S. 6484 (1914), stating that from the 1914 Act "it appears that Congress has, in the United States proper, inaugurated a definite policy of separate dispositions of surface estates and mineral deposits in *certain classes of important fuel and fertilizer minerals.* With this policy, this Department is in hearty accord." *Id.*, at 1-2 (emphasis added).

The Court of Appeals agreed that this analysis "overwhelmingly supports the proposition that gas indirectly or directly valuable for fuel was intended to be reserved," Pet. App. 14a, but refused to conclude that *only* fuel gases are subject to reservation under the statute. Pet. App. 14a-16a. Neither of the court's proposed alternative constructions, however, are plausible.

First, the court suggested that "[t]he six enumerated substances constitute one class if the class is defined as 'nonmetalliferous minerals.' " Pet. App. 15a. This is a non sequitur. The enumerated substances are all indeed nonmetalliferous minerals, but they obviously do not exhaust the *universe* of nonmetalliferous minerals, which includes everything from helium to bat guano. It remains to be explained why the statute organizes this particular subset of nonmetalliferous minerals in the fashion that it does.

Second, the court pointed to a 1914 colloquy between the Chairman of the House Committee on Public Lands and the Director of the United States Geological Survey concerning an unenacted bill proposing leasing procedures for certain nonmetalliferous minerals as suggesting that the Chairman "appeared to have thought that each enumeration may have constituted a separate 'class' of minerals." Pet. App. 16a:

> Rep. Ferris: This bill purports to deal with six classes of deposits in the United States.
>
> Mr. Smith: You might make that simpler by saying there are two general classes of deposits, mineral fuels and mineral fertilizers.
>
> Rep. Ferris: I was following the wording of the bill.

Hearings on H.R. 14094 Before the House Committee on the Public Lands, 63d Cong., 2d Sess. 16 (1914) (*quoted in* Pet. App. 21a). If anything, this passage strongly *supports* petitioners' view of the meaning of the 1914 Act, which, unlike the unenacted bill discussed above, plainly groups together in sequence "two general classes" of deposits.[12]

C. No Extrinsic Considerations Cast Doubt on the Statute's Plain Meaning.

In the various proceedings below, petitioners have consistently argued that the legislative history, context, and purpose of the 1914 Act all strongly support the reading mandated by the text. The arguments are lengthy, and we will not attempt to summarize them here (though we will vigorously advance them if certiorari is granted). It suffices for purposes of this petition that while the Court of Appeals did not accept our arguments, neither did it find that these extrinsic considerations strongly favored the government:

> Our review of legislative and historical materials surrounding the enactment of the 1914 Act fails to clear up the ambiguity in the word "gas" as employed in the 1914 Act. [Petitioners] point to nothing in these extrinsic sources even intimating that Congress has "directly addressed the precise question at issue," *Chevron*, 467 U.S. at 843, in favor of their proposed limiting construction. If anything, a comparison of the term "gas" as used in related statutes favors a generic construction of the

[12] The Interior Department has itself concluded that "[*t*]*he specific intent of Congress* in enacting the Act of July 17, 1914 [the 1914 Act] was to allow agricultural entry of certain withdrawn and classified lands while reserving those *fuel and fertilizer minerals* specified in the patent." Memorandum of the Regional Solicitor of the Department of the Interior, Denver, to the State Director, BLM, Colorado (July 12, 1979) (Subject: Reservation of carbon dioxide gas in land patent 1-2) (emphasis added).

> term, although we believe it equally likely that Congress had no intent whatsoever concerning carbon dioxide gas.

Pet. App. 23a. Thus, it is clear, at a minimum, that these considerations cannot *overcome* the force of petitioners' plain meaning argument, even if they do not (as we have contended) overwhelmingly reinforce it.

We do, however, wish to comment in passing on the one extrinsic consideration that the Court of Appeals read as "favor[ing] a generic construction" of the word "gas" in the 1914 Act. The Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437 (codified as amended at 30 U.S.C. §§181-287 (1988)) ("MLA"), authorizes the Interior Department to lease governmentally owned "coal, phosphate, sodium, oil, oil shale, or gas," 30 U.S.C. §181, subject to the following proviso:

> [T]he United States reserves the right to extract helium from all gas produced from lands permitted, leased or otherwise granted under the provisions of this Act .... Provided further, That in the extraction of helium from gas produced from such lands, it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof ....

Ibid. The Court of Appeals concluded that this statute should be read *in pari materia* with the 1914 Act, and that its language "has meaning only if Congress understood 'gas' to mean the raw gas stream from a well, including both combustible and noncombustible components." Pet. App. 22a. That is, unless a lease of governmentally-owned "gas" rights under the MLA generically conveyed the rights to nonfuel gases like helium, the specific reservation of helium rights would be pointless.

Even assuming, as we strongly doubt, that the MLA and the 1914 Act can properly be read *in pari materia*,[13] the argument proves too little. Consider a lease of rights to "coal." The coal deposits will contain some quantity of impurities (such as sulfur or phosphorus) which do not themselves constitute "coal." Nonetheless, a conveyance of "coal" would ordinarily be taken to convey as well the commingled impurities—not because they are "coal," but because they are commingled. Such a conveyance of "coal" would not, however, include a contiguous but separate deposit of pure sulfur.

Similarly, where fuel gas deposits leased under the MLA contain commingled quantities of helium impurities, the conveyance of "gas" rights would, in the absence of a statutory reservation, ordinarily convey as well the commingled helium—not because the helium is "gas" within the meaning of the MLA, but because it is commingled. Difficult questions can arise when the quantity of a commingled impurity in a conveyed or reserved deposit is so large that the impurity is arguably a separate deposit, but the principle is clear.

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[13] For one thing, the MLA deals with the leasing of resources *clearly owned* by the government, while the 1914 Act deals with the *allocation of resource ownership* between the government and the patent-holder. Accordingly, there are good reasons to read the former statute more broadly than the latter.

D. The Tenth Circuit's Crucial Role in the Administration of Land Patents Warrants a Grant of Certiorari.

The panel's decision in this case stands as the law of the Tenth Circuit, which includes the states of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. As of 1948, these states contained 951,249 acres of land (nearly forty percent of the total) whose patents are subject to "oil and gas" reservations. Since 1948, an additional 2,973,804 acres of land have been patented with similar reservations, many no doubt in the Tenth Circuit. This case alone involves more than 15,000 acres and approximately $500,000,000.00 worth of deposits. The consequences of the Court of Appeals' decision are enormous.

This Court has previously recognized the crucial role of the Tenth Circuit in construing land patent statutes such as the 1914 Act. For example, *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983), concerned the scope of a provision in the Stock-Raising and Homestead Act of 1916, ch. 9, 39 Stat. 862 (codified as amended at 43 U.S.C. §§291-99 (1988)) ("SRHA"), reserving to the government title to "all the coal and other minerals," 43 U.S.C. §299, in lands opened for settlement under the SRHA. In a 5-4 decision, this Court reversed a holding of a Tenth Circuit panel that "gravel . . . did not constitute a mineral reserved to the United States under the SRHA," 462 U.S. at 42. Significantly, the Court explained that this "issue of first impression in the federal courts," *id.* at 42 n.4, was worthy of certiorari "[i]n view of the importance of the case to the administration of the more than 33 million acres of land patented under the SRHA . . . ." *Id.* at 42. This case is equally important to the administration of the land patented under the 1914 Act, and equally worthy of review by this Court.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Tenth Circuit Dated September 20, 1990

PUBLISH

UNITED STATES COUT OF APPEALS
TENTH CIRCUIT

No. 88-2349

FILED
United States Court of Appeals
Tenth Circuit
SEP. 20 1990
ROBERT L. HOECKER
Clerk

JOE AULSTON and LOLA AULSTON, *et al.*,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants-Appellees,
and

SHELL WESTERN E & P, *et al.*,
Intervenors-Appellees.

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 87-F-1144)

Robert H. Bork, Washington, D.C. (Luke J. Danielson, Denver, Colorado, and Stephen Muse, San Antonio, Texas, with him on the briefs), for Plaintiffs-Appellants.

George W. Van Cleve (Michael J. Norton, Acting United States Attorney and Paula M. Ray, Asst. U.S. Attorney, Denver, Colorado, with him on the brief), for Defendants-Appellees.

Marla J. Williams (Steven B. Richardson with her on the brief), Holme Roberts & Owen, Denver, Colorado, for Intervenors-Appellees.

Before HOLLOWAY, *Chief Judge*, SEYMOUR, and MOORE, *Circuit Judges*.

SEYMOUR, *Circuit Judge*.

This case presents us with the question whether oil and gas reservations to the United States in federal land patents pursuant to the Agricultural Entry Act of 1914, 30 U.S.C. §§121-125 (1988) (1914 Act), include deposits of carbon dioxide gas. The Department of the Interior and the district court concluded that the carbon dioxide gas was reserved to the government. We agree and hold that the term "gas" in the 1914 Act reasonably may be interpreted to include the carbon dioxide deposits.

I.

A.

Plaintiffs are owners of ranchlands and dryland farms in Montezuma and Dolores Counties in the State of Colorado. Underlying or adjacent to these lands are portions of the McElmo Dome, a geologic formation

containing a large amount of nearly pure carbon dioxide, which is an inert, non-combustible, odorless gas at normal temperature and pressure conditions. The gas was discovered in the Dome in the 1950s. Although of little or no commercial value for decades,[1] the combination of the domestic oil shortages of the 1970s and the resultant development of tertiary oil recovery methods employing carbon dioxide suddenly transformed the gas into a valuable resource. Since 1982, carbon dioxide gas has been pumped from plaintiffs' lands by private oil companies under a leasing arrangement with the United States government. The gas is transported by pipeline to otherwise depleted oil fields in Texas, where it is used both as a pressurizer and a solvent to enhance oil recovery there.

The United States' claim to ownership of the carbon dioxide gas derives from reservations to the United States of "oil and gas" or "oil, gas, potash and sodium" contained in plaintiffs' or their predecessors' federal land patents issued under the homestead laws. The reservations at issue were created pursuant to the Agricultural Entry Act of 1914, ch. 142, 38 Stat. 509 (codified as amended at 30 U.S.C. §§121-125 (1988)) (1914 Act). The 1914 Act provided for homestead entry onto lands withdrawn from entry, classified, or reported as valuable for "phosphate, nitrate, potash, oil, gas, or asphaltic minerals," subject to reservations to the United States of the enumerated resources "on account of which the lands were withdrawn or classified or reported as valuable." *Id.* §121. Plaintiffs claim that the term "gas" in the 1914 Act and in the patents refers to combustible hydrocarbon gas only.

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[1] In the 1930s, carbon dioxide gas had a limited commercial value in the making of dry ice for refrigeration.

To gain a proper understanding of the statute at issue, we must put it into its historical context. As is true for much of the West, plaintiffs' lands originally comprised part of a vast public domain. In the second half of the nineteenth century, Congress enacted homestead laws to encourage settlement and agricultural development of these immense stretches of land. *See e.g.*, Homestead Act of 1862, ch. 75, 12 Stat. 392 (codified as amended at 43 U.S.C. §§151-302 (1982)), *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2787.

Settlement occurred at a rapid pace and full fee title to much of this land passed into private hands. In the conservation-minded, Progressivist era of the first few decades of the twentieth century, the concern arose that valuable resources in the public domain should remain in public hands to avoid imprudent development, add to public revenues, and avert the threat of monopolization. *See generally* Colby, *The New Public land Policy with Special Reference to Oil Lands*, 3 Cal. L. Rev. 269 (1915). In particular, the homestead entry laws were viewed as subject to abuse by speculators interested only in the mineral resources underlying them. *See The Classification of the Public Lands*, 537 USGS Bull. 38-39, Dep't of the Interior (1913) (Bulletin 537). Presumably for fear of the consequences of legislative delay, the Department of the Interior unilaterally withdrew from homestead entry millions of acres believed to contain oil, gas, phosphate, or coal. *See id.* at 38-43; *see also United States v. Midwest Oil Co.*, 236 U.S. 459, 478-79 (1915) (describing executive land withdrawals).

In 1910, Congress recognized the executive's authority to make land withdrawals and provided a procedure by which the Department of the Interior could withdraw any public lands and reserve them for the public purpose set forth in the withdrawal order. *See* Pickett Act of 1910, ch. 421, 36 Stat. 847 (codified as amended at 43 U.S.C. §§141-142 (1970)), *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792; *see also Midwest Oil Co.*, 236 U.S. at 482-83 (validating executive withdrawals and discussing purpose and effect of Pickett Act). The Pickett Act withdrawals were only partial, however. When originally enacted, the Act provided that lands so withdrawn would remain open for development and purchase of "minerals *other than* coal, oil, gas and phosphates." Ch. 421, 36 Stat. 847. In 1912, Congress amended the Pickett Act and replaced this list of excluded minerals with a provision allowing exploration and purchase of metalliferous minerals on withdrawn lands. *See* Act of August 24, 1912, ch. 369, 37 Stat. 497. Under the Pickett Act, the Department of the Interior continued with its policy of withdrawing vast quantities of land it believed valuable for petroleum (including gas), phosphate, potash, waterpower, coal, and other nonmetalliferous minerals. *See* Letters from the Secretary of the Interior to Congress (Dec. 13, 1912 and December 16, 1913) (Report on Land Withdrawals from Settlement, Location, Sale, or Entry under Provisions of the Act of Congress Approved June 25, 1910, 36 Stat. 847).

In addition to the Pickett Act land withdrawals, the United States Geological Survey (USGS) embarked on a large-scale program of classification of the public lands according to their mineral, hydrologic, and agricultural

characteristics. *See generally* Bulletin 537. Under the USGS system then in use, mineral lands could be classified as coal lands, oil and gas lands, potash lands, or phosphate lands, among other minerals. *See id.* Concerning oil and gas, the Survey noted:

> "The immediate purpose of the classification of oil and gas land is to withhold from entry all lands containing valuable deposits of fluid hydrocarbons pending the enactment of adequate legislation providing for their disposition. The ultimate purpose of the classification is to determine the position and extent of the areas whose value for their deposits of oil or gas, whether proved by actual drilling or indicated by favorable geologic conditions, is greater than their value for agriculture or other purposes and to provide for a disposition of the deposits in accordance with this greater value."

Id. at 117. Once land was so classified, a proposed withdrawal order would be sent to the Secretary of the Interior for appropriate action.[2]

In the wake of these large-scale withdrawals, it was evident that valuable farm or ranch lands would go untilled or ungrazed because they were withdrawn from entry on account of the valuable deposits believed to exist there. Congress responded with a series of acts, including 1914 Act, permitting homestead entry onto such lands while reserving various types of mineral estates in the United States. *See, e.g.,* Act of March 3, 1909, ch. 270, 35 Stat. 844 (codified at 30 U.S.C. §81 (1988)) (reserving coal); Act of August 24, 1912, ch. 367, 37 Stat. 496, *repealed by* Act of December 16, 1930, ch. 14, 46 Stat. 1028 (reserving enumerated mineral resources in land patents issued in Utah); 1914 Act

[2] The Pickett Act also authorized withdrawals to allow time for classification of lands. *See* ch. 421, 36 Stat. 847.

(authorizing reservations of phosphate, nitrate, potash, oil, gas, and asphaltic minerals); Stock Raising Homestead Act of December 29, 1916, ch. 9, 39 Stat. 864 (codified at 43 U.S.C. §299 (1982)) (reserving "coal and other minerals"); *see generally* Bate, *Mineral Exceptions and Reservations in Federal Public Land Patents*, 17 Rocky Mtn. Min. L. Inst. 325, 345-50 (1972).

Plaintiffs' or their predecessors' patents contain reservations of "oil and gas" or "oil, gas, potash and sodium"[3] pursuant to the 1914 Act. A typical patent grants the land to the homestead claimant

> "EXCEPTING AND RESERVING TO THE UNITED STATES all oil and gas in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the [1914 Act]."

Rec., vol. II, at 2. The relevant portions of the 1914 Act in turn provide:

> "Lands withdrawn or classified as phosphate, nitrate, potash, oil, *gas*, or asphaltic minerals, or which are valuable for these deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same."

30 U.S.C. §121 (1988) (emphasis added).

[3] In 1933, the 1914 Act was amended to include reservations of sodium and sulphur. *See* Act of Mar. 4, 1933, ch 278, 47 Stat. 1570 (codified at 30 U.S.C. §124 (1988)).

Section 2 of the 1914 Act specifies that any deposits so reserved "shall be subject to disposal by the United States . . . as shall be hereafter expressly directed by law." *Id.* §122. Six years later, Congress provided for the disposal of the reserved deposits in the Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437 (codified as amended at 30 U.S.C. §§181-287 (1988)). The Mineral Leasing Act provided the Department of the Interior with authority to lease deposits of coal, phosphate, oil shale, oil, gas, and sodium owned by the United States. Significantly, the Mineral Leasing Act expressly excepted helium from its provisions regulating the leasing of "gas" rights. *See id.* §181. Under various versions of this Act, the United States has leased its gas rights in hydrocarbons and in carbon dioxide, including the carbon dioxide at issue here, to various private concerns.

B.

In the late 1970s, after the carbon dioxide in the McElmo Dome was discovered and its value in oil production became apparent, various plaintiffs sought the Department of the Interior's determination as to who owned it. The Department asserted that the deposits were "gas" within the meaning of the reservations in plaintiffs' patents under the 1914 Act. *See* rec., vol. II, at 201-03 (Memorandum from the Regional Solicitor, Denver, Department of the Interior, to the State Director of the Bureau of Land Management (July 12, 1979)). Plaintiffs responded with a class action in the United States District Court for the District of Colorado challenging the Interior Department's assertion of ownership of the carbon dioxide, and seeking compensation under the "Little Tucker Act," 28 U.S.C. §1346(a)(2) (1988).

The district court dismissed the class action. The attack on the Interior Department's determination of ownership was ruled unripe because plaintiffs had failed to exhaust their administrative remedies by bringing an administrative appeal before the Interior Board of Land Appeals (IBLA). *See* 43 C.F.R. §3000.4 (1989). The district court also held it lacked jurisdiction over the Tucker Act claim because it exceeded $10,000. *See* 28 U.s.C. §1346(a)(2). The court observed that claims against the United States exceeding $10,000 must be brought in the Claims Court under 28 U.S.C. §1491 (1988). *See Ives v. United States,* Civ. No. 80-K-705 (D. Colo. March 25, 1981).

Plaintiffs returned to the administrative arena. Following the district court's suggestion, plaintiffs filed a private contest action against the Department of the Interior which was dismissed because the United States is not a proper defendant in such actions. *See* 43 C.F.R. §4.450 (1989). The Department suggested that plaintiffs file an application for a recordable disclaimer of interest, under which the FLPMA authorizes the Interior Department to issue a sort of quitclaim deed to clear title to real property in which the United States may have a colorable but invalid interest. *See* 43 U.S.C. §1745 (1982); 43 C.F.R. §§1864.0-1 to .4 (1989). Plaintiffs filed their application, which the Department denied. The Department's decisions were appealed to the IBLA pursuant to 43 C.F.R. §1864.4, and the IBLA affirmed. *See Robert D. Lanier,* 93 Interior Dec. 66 (1986); *Norton,* I.B.L.A. 88-22 (Nov. 27, 1987).

Plaintiffs sought review of the IBLA's decision, in conjunction with their damages claim, in the United States Claims Court. The Claims Court concluded, however, that it had no jurisdiction to set aside the

IBLA's decision. The court's inability to determine ownership of the carbon dioxide also precluded consideration of plaintiffs' Tucker Act claim because plaintiffs' ownership of the gas is an obvious predicate to the validity of their damage claim. The Claims Court therefore dismissed the action. *See Aulston v. United States,* 11 Cl. Ct. 58 (1986).

On appeal, the Federal Circuit affirmed. The court realized, however, that substantial time had already elapsed in administrative and judicial forums and that plaintiffs had yet to seek review of the IBLA's decision in the proper forum. By the time their ownership would be finally determined, the statute of limitations on their damage claim would likely run. The court therefore vacated the dismissal of plaintiffs' claim for damages, directing that the action be stayed pending resolution of the ownership issue. *See Aulston v. United States,* 823 F.2d 510, 514 (Fed. Cir. 1987).

Plaintiffs returned to the Federal District Court in Colorado to seek review of the IBLA's decision, and the district court affirmed the IBLA. *See Aulston v. United States,* No. 87-F-1144 (D. Colo. Aug. 4, 1988). Plaintiffs appealed.

II.

Our appellate jurisdiction to review a final order of the district court is based on 28 U.S.C. §1291 (1988). Plaintiffs brought their action under 43 U.S.C. §1745 (1982), and appealed to the IBLA pursuant to 43 C.F.R.

§1964.4 (1989). The district court's jurisdiction to review IBLA decisions derives from 28 U.S.C. §1331 (1988) read in conjunction with 5 U.S.C. §§701-706 (1988).[4]

On apeal from a district court's review of an agency decision, " 'the identical standard of review is employed at both levels; and once appealed, the district court decision is accorded no particular deference.' " *Webb v. Hodel*, 878 F.2d 1252, 1254 (10th Cir. 1989) (quoting *Brown v. United States Dep't of the Interior*, 679 F.2d 747, 748-49 (8th Cir. 1982)). Recently, the Supreme Court has reiterated the analysis a court undertakes when it reviews the validity of an agency's interpretation of a statute the agency is charged with administering:

> "We first ask 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' 'In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.' But 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute,' that is, whether the agency's construction is 'rational and consistent with the statute.' "

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[4] Intervenors assert that this action is time-barred under the statute of limitations contained in 30 U.S.C. §226-2 (1988). This limitation does not apply to actions under the FLPMA, but rather to the validity of lease permits issued pursuant to the Mineral Leasing Act, 30 U.S.C. §§181-287 (1988). *See Park County Resource Council v. United States Dep't of Agric.*, 817 F.2d 609, 616 (10th Cir. 1987) (30 U.S.C. §226-2 applies to actions contesting agency decisions made under the Mineral Leasing Act).

Sullivan v. Everhart, 110 S. Ct. 960, 964 (1990) (citations omitted). However, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984).

III.

A.

In interpreting statutes, we begin with the relevant language. When the terms of a statute are unambiguous, our inquiry is complete, except in rare and exceptional circumstances. *See Rubin v. United States*, 449 U.S. 424, 430 (1981). In interpreting the relevant language, however, we look to the provisions of the whole law, and to its object and policy. *See Dole v. United Steelworkers*, 110 S. Ct. 929, 934 (1990).

The 1914 Act creates power in the federal government to reserve the named resources in federal patents for "[l]ands withdrawn or classified as phosphate, nitrate, potash, oil, *gas*, or asphaltic minerals, or which are valuable for those deposits." 30 U.S.C. §121 (emphasis added). The operative word "gas" has numerous meanings in common speech,[5] in the natural sciences,

[5] A typical dictionary definition of gas reads: "1: a fluid (as air) that has neither independent shape nor volume but tends to expand indefinitely . . . 2a: a gas or gaseous mixture with the exception of atmospheric air—not used scientifically b: a gas or gaseous mixture (as laughing gas or ethylene) used to produce anesthesia c: a combustible gaseous mixture (as for fuel or illumination) . . . 3 *slang*: empty boasting talk . . . 4: the state of having or an accumulation of gas in the digestive tract; *also*: distress caused by this 5: a substance (as a war gas or tear gas) whether gaseous, liquid, or solid under ordinary conditions that can be used to produce a poisionous, asphyxiating or irritant atmosphere . . . 6a: gasoline b: the accelerator of a gasoline powered vehicle . . ." *Webster's Third New Int'l Dictionary* 937 (1981).

and in various legal and industrial contexts. Congress' employment of the word in a statute creating power to reserve natural resource rights indicates that "gas" should be understood to mean a natural resource in the legal and techical context of its commercial exploitation. Even within this context, however, the word "gas" has meanings supporting both sides of this dispute.[6]

[6] A widely used manual of oil and gas law contains numerous definitions of the word gas. The first two are:

> " 'Any fluid, either combustible or noncombustible, which is produced in a natural state from the earth and which maintains a gaseous or rarefied state at ordinary temperature and pressure conditions.' 30 C.F.R. §221.2(o) (1980). In the oil and gas industries, it means natural gas.
>
> " 'Twenty-three states define gas as all natural gas, including casinghead gas, and all hydrocarbons not defined as oil. Generally, the remaining states describe the definition of a gas well but do not specifically define natural gas.' 26 *Oil & Gas Compact Bull.* 55 (June 1967)."

8 H. Williams and C. Meyers, *Oil & Gas Law, Manual of Terms* 389 (1987).

The term "natural gas" also has various definitions within the industry:

> "Hydrocarbons which at atmospheric conditions of temperature and pressure are in a gaseous phase."

Id. at 588.

Nonetheless, one commentator writes:

> " 'The ordinary rarefied or gaseous hydrocarbons found in the earth are referred to generally as "natural gas." Noncombustible natural gases occurring in the earth, such as *carbon dioxide,* hydrogen sulfide, helium and nitrogen, are generally referred to by their proper chemical names. *Often, however, noncombustible gases are found in combination with combustible gases and the mixture is referred to generally as "natural gas," without any attempt to distinguish between the combustible and non-combustible gases.*' "

Id. (quoting Pruitt, *Mineral Terms—Some Problems in Their Use and Definition,* 11 Rocky Mtn. Min. L. Inst. 1, 17 (1966)) (emphasis added). In 1921, the United States Geological Survey considered "natural gas" to be a "mechanical mixture" of various hydrocarbons and nonhydrocarbon gaseous constituents. *See Helium Bearing Natural Gas,* 86 USGS Bull. 36, Dep't. of the Interior (1921).

Plaintiffs vigorously maintain that the structure of the relevant language of the 1914 Act reflects a clear intent to reserve only hydrocarbon gas and to convey all other gas in the land patent. In the 1914 Act, the word "gas" appears sandwiched between "oil" and "asphaltic minerals," assertedly two "fuel minerals,"[7] and after a listing of phosphate, nitrate, and potash, assertedly three "fertilizer minerals." It would make no sense, plaintiffs argue, for the drafter to insert "gas" within a grouping of fuel minerals if the word was intended to refer to noncombustible gases such as carbon dioxide. According to plaintiffs, Congress intended the courts to apply the principles of ejusdem generis[8] to limit the term "gas" to hydrocarbon gas.

This structural argument overwhelmingly supports the proposition that gas indirectly or directly valuable for fuel was intended to be reserved. Plaintiffs would have us infer, however, that Congress actually considered the combustible and noncombustible components of naturally occurring underground gas and expressed its intent to reserve only combustible gas by its choice of the sequence in which the reserved minerals were listed. This proposed interpretation immediately prompts us to ask why Congress did not merely reserve "fuel gas" in lieu of relying on ejusdem generis. The manipulability of the rule was well-recognized even during the era of the 1914 Act:

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[7] The phrase "fuel mineral" appears nowhere in the 1914 Act. Various executive officials referred to reservations of "fuel minerals" in the 1914 Act. *See* infra at 23.

[8] Ejusdem generis is an intrinsic aid to statutory construction "Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A N. Singer, *Sutherland Statutory Construction* §47.17 (1984) (footnote omitted).

> "If we should apply the rule of ejusdem generis, what qualities or peculiarities of the specified type 'coal,' shall be considered in determining the classification intended by the use of the word 'mineral'? Are we to classify according to value? If so, can it be said that oil or gas on the one hand and coal on the other are of different kinds or species of minerals? If we classify as to use, is it not true that all three are used for fuel? Shall the classification be determined by the form, density, color, weight, value or uses of the particular species mentioned? Taking either value, use, or nature or origin as the basis of the classification mentioned, can we say that oil and coal do not belong to the same class? . . . Such evident difficulty in applying the rule of *ejusdem generis* to the terms of the reservation under consideration renders it an unsafe guide, and we do not believe any aid in the interpretation of the terms used in the reservation will be afforded by such rule."

Luse v. Boatman, 217 S.W. 1096, 1099 (Tex. Civ. App. 1919).

Indeed, no clear indication exists what classification method Congress would have intended the reader to use. The six enumerated substances constitute one class if the class is defined as "nonmetalliferous minerals." Plaintiffs' suggested subclasses of fuel and fertilizer minerals is another possibility.[9] Representative Scott

[9] This argument is undermined by the judicial rejection of the characterization of "oil" as a specific word. In *Brennan v. Udall*, 251 F. Supp. 12 (D. Colo. 1966), *aff'd*, 379 F.2d 803 (10th Cir.), *cert. denied*, 389 U.S. 975 (1967), for example, the word "oil" in the 1914 Act was construed to include oil shale, a solid sedimentary rock containing kerogen rather than petroleum. *See also Northern Natural Gas Co. v. Grounds*, 441 F.2d 704, 711 (10th Cir.), *cert. denied*, 404 U.S. 951 (1971) (rejecting characterization of "oil" as specific term operating to limit definition of "gas' in lease to combustible gas only); *Navajo Tribe of Indians v. United States*, 364 F.2d 320, 327 (Ct. Cl. 1966) (refusing to apply ejusdem generis to "oil and gas").

(Footnote continued on following page.)

Ferris, the chairman of the House Committee on the Public Lands in 1914, appeared to have thought that each enumeration may have constituted a separate "class" of minerals. *See* infra at 24. The choice of class thus seems to depend primarily on the interpretive result one wants to reach, rather than on a clear indication of congressional intent.

Moreover, in *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704, 711 (10th Cir.), *cert. denied*, 404 U.S. 951 (1971), we rejected the application of ejusdem generis in construing an oil and gas lease. Indeed, the rule of ejusdem generis has had "little application in cases dealing with oil and gas." R. Hemingway, *Law of Oil & Gas* 4-5 (West 1983 2d ed.). We conclude that the text of the 1914 Act gives no indication whether Congress intended to prevent carbon dioxide gas from passing to the patentee.

B.

We next address plaintiffs' historical analysis of the circumstances surrounding the enactment of the 1914 Act and related acts, employing materials from Congressional Reports and debates, as well as from the Department of the Interior and its subdivisions responsible for managing federal lands. They first

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Brennan and *Northern Natural Gas* also preclude plaintiffs' argument that no drafter of a statute would list five "specific" minerals and put the more generic term "gas" somewhere in between them. In our opinion in *Brennan*, we held that "oil" in the 1914 Act was to be broadly defined to include kerogen, a substance containing no oil. In *Northern Natural Gas*, we held that the words "oil" and "gas" have equal status. *See* 441 F.2d at 711. Other minerals enumerated in the Act are thus clearly not as "specific" as plaintiffs would have us believe.

contend that the 1914 Act's relationship to the Pickett Act of 1910 reflects Congressional intent to restrict the reservation of gas to hydrocarbon gas. As discussed above, the Pickett Act provided a procedure by which the Department of the Interior could withdraw lands from homestead entry. The 1914 Act provided for homestead entry onto these withdrawn lands, subject to a reservation to the United States in the enumerated resources "on account of which the land were withdrawn or classified or reported as valuable." 30 U.S.C. §121. The quoted language, maintain plaintiffs, reflects an intent to *limit* the scope of the enumerated substances to those deposits "on account of which the lands were withdrawn." *Id.* Because the lands in question purportedly were withdrawn "on account of" petroleum,[10] carbon dioxide gas deposits are excluded from the "oil and gas" reservations in plaintiffs' patents.

Plaintiffs' argument is unconvincing. First, plaintiffs point to no administrative fact-findings that *their lands* actually *were* the subject of petroleum withdrawals.[11]

[10] So-called "petroleum withdrawals" were common under the Pickett Act and were also part of the practice of the Interior Department prior to the passage of the Pickett Act. *See* supra at 4-5.

[11] In their Reply Brief at 6 n.2, plaintiffs assert that "oil permits" were what led to the reservation of "oil and gas" in plaintiffs' patents under the 1914 Act. The oil permits to which plaintiffs refer appear in the various patentees' waivers and consents to the 1914 Act's reservations in oil and gas in their patents. *see, e.g.*, rec., vol. II, at 181. These permits were considered permits for "oil and gas" by the Department of the Interior. *See id.* at 182. Although not entirely clear, these prospecting permits appear to refer to the Mineral Leasing Act of 1920's provisions allowing private persons to prospect for minerals owned by the United States. *See id.* at 189 (referring to "permit to prospect for oil and gas under the Act of February 25, 1920 (41 Stat. 437)"). As we discuss infra at 25-26, the Mineral Leasing Act defined gas broadly to include both hydrocarbon and nonhydrocarbon gases. Therefore, we do not believe these permits force a limiting construction on the reservations in the 1914 Act to hydrocarbon gas only. To the contrary, they tend to favor a construction of "gas" in pari materia with the Mineral Leasing Act.

The 1914 Act also applies to lands "classified or reported as valuable" for the six enumerated resources. *Id.* The IBLA noted that "[t]here is no evidence that the land involved herein was withdrawn, classified, or reported as valuable on account of carbon dioxide. However, the mineral reservations clearly embrace the term 'gas.' We must, therefore, presume that the land was either withdrawn, classified, or reported as valuable on account of 'gas.' " *Lanier*, 93 Interior Dec. at 70 n.6.

In addition, while there is no evidence that their lands were withdrawn *specifically* "on account of" carbon dioxide gas, evidence that the "gas" on account of which the lands were withdrawn, classified, or reported as valuable *excluded* carbon dioxide is also absent. It is true that such withdrawals were termed "petroleum" withdrawals in the Department's yearly reports to Congress, *see, e.g.*, Letters from the Secretary of the Interior to Congress dated Dec. 13, 1912 and Dec. 16, 1913, *supra*, but plaintiffs concede that the withdrawals encompassed oil *and* "gas." *See* Opening Brief at 19. Congress in the Pickett Act of 1910 excepted "gas" in withdrawn lands from "exploration, discovery, occupation and purchase" under federal mining laws. 36 Stat. 847. Plaintiffs provide us no reason for construing the term narrowly in the Pickett Act of 1910. Indeed, two years before the 1914 Act was passed, the Pickett Act was amended to exempt nonmetalliferous minerals, indubitably encompassing carbon dioxide gas. *See* 37 Stat. 497. We do not agree with plaintiffs that the Pickett Act somehow forces a limiting construction on the word "gas" in the 1914 Act. It is entirely plausible that Congress contemplated the raw natural gas stream from a gas well in both acts.

Plaintiffs next contend that Congress knowingly adopted the definition of gas then used by the sub-agencies of the Department of the Interior charged with the administration of federal lands. A 1913 treatise concerning the classification of federal lands published by the United States Geological Survey, for example, described the immediate purpose of classifying oil and gas land "to withhold from entry all lands containing valuable deposits of fluid hydrocarbons pending the enactment of adequate legislation providing for their disposition." Bulletin 537 at 117. Assuming that Congress adopted and approved this language, it reveals no clear intent to reserve *only* hydrocarbon gas.[12] Indeed,

[12] In support of its argument that Congress adopted this definition, plaintiffs cite to one comment by Representative Mondell, the 1914 Act's sponsor, in House debate on the 1914 Act. Representative Mondell stated:

> "[I]f land is withdrawn for oil, coal and gas, *the two being always coupled*, the reservation would be at the oil and the gas and the coal."

51 Cong. Rec. 10,493 (1914); rec., vol. II, at 22 (emphasis added).

In our view this statement again supports the proposition that fuel gas was the primary, if not the only, concern of Representative Mondell. It does not mean that he approved of the USGS publications on the subject. It also does not mean that he, or Congress for that matter, intended to convey all other types of gas to the patentee.

Were this statement given the literal import that plaintiffs suggest, certain types of fuel gas such as "dry gas" would pass to the patentee because it is not "coupled" with oil. *See* 8 H. Williams and C. Meyers, *Oil & Gas Law, Manual of Terms*, 283 (1987) (dry gas is gas produced from a stratum that does not contain crude oil). On the other hand, it was well known at the time that nonhydrocarbon gases often are "coupled" with oil. *See Mineral Resources of the United States*, 323-333 USGS Bull., Dep't. of the Interior (1911) (indicating composites of natural gas in California fields as including significant nonhydrocarbon constituents); *Helium-Bearing Natural Gas* 86 USGS Bull. 36 (nonhydrocarbon gases occur in most natural gas and are important constituents in some varieties). Perhaps because of these uncertainties Congress saw fit to reserve "gas" regardless of its chemical composition. Plaintiffs point to no legislative history dictating otherwise.

that same document reflects awareness that "oil and gas" may encompass more than hydrocarbons. For instance, the Bulletin defined oil and gas as being composed "*for the most part* of carbon and hydrogen." *Id.* at 112 (emphasis added). Although these other substances composing oil and gas remain unnamed, Congress was probably aware that while "gas" usually meant fuel gas, it also could mean noncombustible, naturally-occurring underground gases such as the carbon dioxide at issue here. *See, e.g., Mineral Resources of the United States,* 323-333 USGS Bull., Dep't of the Interior (1911) (showing gaseous components of natural gas fields in California, including carbon dioxide).

The Department of the Interior refers several times in connection with the entry acts to the reservation of "fuel minerals" and "fuel gases." For example, Franklin K. Lane, then the Secretary of the Department of the Interior, characterized coal, phosphate, oil, gas, potassium, and sodium as fuel and fertilizer minerals. *See* rec., vol. II, at 99 (Letter from Franklin K. Lane, Secretary of the Department of the Interior to Rep. Scott Ferris, Chairman of the House Committee on Public Lands (May 1, 1914) (concerning H.R. 16136, reserving minerals to United States)); *see also id.* at 116 (Letter from Franklin K. Lane, Secretary of the Interior to Sen. Henry L. Myers, Chairman of the Committee on Public Lands (Jan. 10, 1916) (concerning S. 777, referring to enumerated substances as fuel and fertilizer minerals)); *id.* at 141 (Letter from First Assistant Secretary of the interior A.A. Jones to Sen. Henry L. Myers, Chairman of the Committee on Public Lands (Sept. 16, 1914) (concerning S. 6484 extending reservations to Alaska and referring to definite policy of separate dispositions of "surface estates and mineral deposits in certain classes of important fuel and fertilizer minerals")).

Plaintiffs ask us to infer from these executively generated materials that Congress clearly adopted a narrow interpretation of gas. We note first that plaintiffs' citations from historical sources are selective. Other items of correspondence concerning the same subject matter simply enumerate the listed substances. *See, e.g.*, Letter from A.A. Jones, Assistant Secretary of the Interior to Rep. Scott Ferris, Chairman of the House Committee on Public Lands (Jan. 16, 1914); Letter from Franklin K. Lane to Rep. Scott Ferris, Chairman of the House Committee on Public Lands (Mar. 12, 1914). More significantly, the 1914 Act itself incorporated one of the language employed in the letters and documents to which plaintiffs cite. In fact, there is some evidence that some members of Congress rejected the Department's proposed characterization. In testimony concerning a 1914 bill to lease mineral deposits owned by the United States, the following colloquy between the Chairman of the House Public Lands Committee and the Director of the USGS took place:

> "Rep. Ferris: This bill purports to deal with six classes of deposits in the United States.
>
> Mr. Smith: You might make that simpler by saying there are two general classes of deposits, mineral fuels and mineral fertilizers.
>
> Rep. Ferris: I was following the wording of the bill."

Hearing before the House Committee on the Public Lands, House of Representatives, 63d Cong., 2d Sess., on H.R. 14094 (1914) at 16.

Most importantly, six years later in the Mineral Leasing Act of 1920, Congress again employed the word "gas" in an enumeration comparable to the 1914 Act,

granting authority to the Department of the Interior to lease "coal, phosphate, sodium, oil, oil shale, or gas" owned by the United States. 41 Stat. 437. The 1920 Act also provided that

> "the United States reserves the right to extract helium from all *gas* produced from lands permitted, leased or otherwise granted under the provisions of this Act .... *Provided further,* That in the *extraction of helium from gas produced from such lands,* it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof ...."

41 Stat. 438 (emphasis added). The emphasized language has meaning only if Congress understood "gas" to mean the raw gas stream from a well, including both combustible and noncombustible components. Aside from the snippets of legislative history such as those discussed above, plaintiffs offer no reason why the word "gas" in these two substantially contemporaneous and interrelated statutes should not be construed in pari materia. At the very least, the 1920 Mineral Leasing Act demonstrates that when Congress intended to legislate concerning naturally occurring underground gases in a generic sense, it chose the word "gas" with full knowledge that the word would be construed to mean combustible *and* noncombustible gases.[13]

[13] It is conceivable that Congress intended "gas" to mean hydrocarbon gas only in the 1914 Act, and then used the same word in the 1920 Mineral Leasing Act generically to mean naturally-occurring underground gases. However, two years after the enactment of the 1920 Mineral Leasing Act, Congress reserved "coal, oil or gas" in Alaska patents without qualifying or amending the reach of the term "gas." *See* Act of March 8, 1922, ch. 96, 42 Stat. 415 (codified as amended at 43 U.S.C. §§270-11 to 270-12), *repealed in part by* FLMPA §703(a), 90 Stat. 2790 (1976). Given the explicit concern over helium in the Mineral Leasing Act and the implicit

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Our review of legislative and historical materials surrounding the enactment of the 1914 Act fails to clear up the ambiguity in the word "gas" as employed in the 1914 Act. Plaintiffs point to nothing in these extrinsic sources even intimating that Congress has "directly addressed the precise question at issue," *Chevron*, 467 U.S. at 843, in favor of their proposed limiting construction. If anything, a comparison of the term "gas" as used in related statutes favors a generic construction of the term, although we believe it equally likely that Congress had no intent whatsoever concerning carbon dioxide gas.

IV.

Having concluded that Congress was silent on the question whether carbon dioxide is "gas" within the meaning of the 1914 Act, we next address plaintiffs' argument that we must not defer to the Department of the Interior's construction of the Act. Deference is not warranted, they argue, because there is no "longstanding and consistent agency policy of defining carbon dioxide to be a 'gas.' " Opening Brief at 35.

Until the inception of this dispute, the Department of the Interior had no occasion to determine explicitly whether carbon dioxide is "gas" within the meaning of

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assumption that "gas" included helium, it seems far-fetched indeed to conclude that Congress would have reserved fuel gas only in the 1922 Act. It also seems unlikely that Congress would consciously use "gas" to mean fuel gas in 1914, then use "gas" to mean naturally-occurring underground gases in 1920, and then revert to the narrow meaning in the Alaska gas reservations. That Congress would reserve fuel gas only in the contiguous United States and then reserve gas in the generic sense in Alaska without making itself more explicit seems equally irrational. The most rational reading is that Congress intended "gas" to mean the same thing in all three statutes.

the 1914 Act. Plaintiffs maintain that the determinative administrative interpretations of a statute vesting property rights are those contemporaneous with the passage of the Act, and that those interpretations make clear the Department's original understanding that only fuel gas was reserved. They argue that the Department's current construction of the word "gas" to include carbon dioxide conflicts with its earlier definitions, robbing the current construction of its entitlement to judicial deference. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (agency interpretation conflicting with earlier interpretation entitled to considerably less deference than a consistently held view); *Shoshone Indian Tribe v. Hodel*, 903 F.2d 784, 787 (10th Cir. 1990) (same).

To support their argument, plaintiffs refer us to Bulletin 537, concerning the classification of the lands of the United States. We have already discussed Bulletin 537, *see supra* at 21-22, and we think that it constitutes overwhelming evidence that gas in the Department's view meant "for the most part"[14] fuel gas, but not *only* fuel gas. Plaintiffs provide no conclusive or even persuasive support for their suggested negative inference that only fuel gas constituted gas in the early Department interpretations. It is equally plausible that the Department had in mind the raw natural gas stream from a gas well, the only significantly valuable component of which was fuel gas.

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[14] Other USGS Publications make it clear that the Agency considered carbon dioxide to be a *component* of natural gas. *See, e.g., Mineral Resources of the United States*, 323-333 USGS Bull., Dep't of the Interior (1911) (table entitled "The Composition of Natural Gas" includes hydrocarbons, carbon dioxide, and other gases).

This economic fact could well explain why in many Departmental publications the term gas was used mainly in the context of gas in association with oil. *See Petroleum Withdrawals and Restorations Affecting the Public Domain,* 623 USGS Bull. 59, Dep't of the Interior (1916) ("close analogy between the oil and natural gas industries, *at least as far as the production is concerned*") (emphasis added) (citation omitted)); *Bibliography of North American Geology for 1914,* 617 USGS Bull. 295, Dep't of the Interior (1915) (noncombustible gases occurring in oil fields generally not subject of analysis); *Useful Minerals of the United States,* 585 USGS Bull. 237, Dep't of the Interior (1914) (natural gas is mixture of gaseous hydrocarbons). These documents conflict with the Department's current interpretation concerning carbon dioxide only if we stretch their meaning to support the negative inference suggested by plaintiffs. Indeed, 617 USGS Bulletin, published in 1915, characterized ninety-one percent pure carbon dioxide gas as "natural gas." *See* 617 USGS Bull. at 203 (table entitled Analyses of Natural Gas From Farnham Dome Utah). We conclude that the Department's interpretation of the 1914 Act to include carbon dioxide gas in the Act's reservation of "gas" does not conflict with its interpretation of the word gas at the time of the Act's passage.

Plaintiffs, the government, and intervenors all cite to numerous agency definitions of "gas" issued over the years for various purposes and in various contexts. Plaintiffs argue that these definitions reflect the contradictory and inconsistent agency position on the definition of gas over time. The government and intervenors maintain that they represent the Department's long-standing and consistently held view

that "gas" includes carbon dioxide gas.[15] Several generalizations can be made about them. First, none of these definitions interpret the 1914 Act. Second, the definitions clearly encompassing noncombustible gases all interpret the Mineral Leasing Act which regulates the conveyance of gas deposits to which the United Staes holds title. Third, the narrower definitions plaintiffs cite concern specialized issues of regulatory jurisdiction, involve unrelated statutes, or are the products of internal memoranda or particularized factual circumstances. *See United Transp. Union v. Dole,* 797 F.2d 823, 831 (10th Cir. 1986) (Logan, J. concurring) ("judicial deference generally is reserved for agency views that have been

[15] The Department of the Interior, for purposes of the Mineral Leasing Act has defined "gas" broadly. *See, e.g.,* 55 Interior Dec. 502, 511, 521 (1936) (providing for royalty "on gas *including* inflammable gas, helium, *carbon dioxide* and all other natural gases and mixtures thereof" under Mineral Leasing Act) (emphasis added); 30 C.F.R. §221.2(o) (1942), currently codified at 43 C.F.R. §3000.0-5(a) (1989) ("gas" under Mineral Leasing Act is "any fluid, either combustible or noncombustible, which is produced in a natural state from the earth and which maintains a gaseous or rarefied state at ordinary temperatures and pressure conditions"); 30 C.F.R. §206.151 (1989) (" '[g]as' means any fluid, either combustible or noncombustible, hydrocarbon or nonhydrocarbon, which is extracted from a reservoir and which has neither independent shape nor volume" for purposes of Bureau of Land Management's leasing of gas on Indian Lands).

In other statutory contexts, the definition of gas is arguably narrower. *See* 30 C.F.R. §259.002 (1989) (" 'Gas means natural gas as defined by the Federal Energy Regulatory Commission,' " for purposes of administering the Outer Continental Shelf Lands Act). The Federal Energy Regulatory Commission ruled in 1979 that the carbon dioxide at issue here was not "natural gas" for purposes of jurisdiction under the Natural Gas Act. *See Cortez Pipeline Co.,* 7 F.E.R.C. (CCH) ¶61,024 (1979); *see also* rec., vol. II, at 160 (memorandum from Solicitor of the Department of the Interior to the Secretary of the Department of Interior (dated April 9, 1931) noting that issuance of prospecting permits for carbon dioxide gas under Mineral Leasing Act could not violate oil and gas conservation policy of 1929).

reflected in *formal* pronouncements or have been known through other means for a long time" (emphasis added)).[16]

The law is clear that "great deference" is accorded "consistent and long-standing agency interpretations." *Knutzen v. Eben Ezer Lutheran Housing Center*, 815 F.2d 1343, 1350 (10th Cir. 1987). This deference generally applies, however, to agency interpretations of the statute in question, where the interpreting agency is empowered to administer the statute. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965). In exceptional circumstances, such as where two different statutes were enacted substantially contemporaneously as part of a larger policy or program, or where one statute expressly or implicitly incorporates the language and policy of the other, we believe the agency's interpretation of the related statute should

[16] The rationale for disregarding internal memoranda in determining agency positions for purposes of deference is bound up with the reason for considering the consistency of agency views in the first place. In *Udall v. Tallman*, 380 U.S. 1, 16 (1965), Chief Justice Warren wrote that "[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." Part of the reason there for deferring to the Department of the Interior's construction of an Executive Order was that the interpretation had long been a matter of "public record and discussion." *Id.* at 17. The Court quoted an earlier case for its rationale:

> " '[G]overnment is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.' "

Id. (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915)).

carry some weight so long as the same agency is empowered to administer both statutes. We have previously discussed the relationship of the Mineral Leasing Act and the series of acts, including the 1914 Act, reserving minerals subject to disposition under the 1920 Leasing Act. *See* supra at 8, 24-25. Based on this relationship, we think that the Department of the Interior's interpretations of the word "gas" in section 181 of the Mineral Leasing Act are entitled to some consideration in reviewing the same agency's interpretation of the word in the 1914 Act.

The definitions cited by plaintiffs interpret such temporally and factually distinct statutes as the Outer Continental Shelf Lands Act, 43 U.S.C. §§1331-1356 (1982); *see* 30 C.F.R. §259.002 (1989); 30 C.F.R. §256.40(h) (1989), or involve separate statutory schemes administered by different agencies such as the scope of the Federal Energy Regulatory Commission's jurisdiction under the Natural Gas Act. *See Cortez Pipeline Co.*, 7 F.E.R.C. (CCH) ¶61,024 (1979). These wholly distinct interpretations of the word "gas" by agencies other than the Department of the Interior in these other contexts have no bearing on the Department's interpretation of the 1914 Act or of the related Mineral Leasing Act, and do not make the Department's practice internally inconsistent.[17] We are

[17] Plaintiffs also rely on 43 C.F.R. §2880.0-5(g) (1988), which defines "[o]il or gas" as "oil, *natural gas*, synthetic liquid or gaseous fuels, or any refined product produced therefrom." This regulation parrots the language in the Mineral Leasing Act's provisions governing rights-of-way for pipelines through federal lands. *See* 30 U.S.C. §185 (1988). It is by no mean as clear that this definition excludes carbon dioxide gas. Indeed, in *Exxon Corp.*, 94 Interior Dec. 139 (1987), the IBLA determined that the term natural gas includes naturally produced carbon dioxide gas within the meaning of 30 U.S.C. §185 and 43 C.F.R. §2880.0-5(g). This language, in any event, in no way renders internally inconsistent the Department of the Interior's forty-five year old interpretation of "gas" *deposits* within the meaning of section 181 of the Mineral Leasing Act.

also not persuaded that the Interior Department memoranda cited by plaintiffs suffice to alter substantially the Department's longstanding *publicly-held* view as reflected in the regulations governing the leasing of oil and gas deposits. We conclude that the interpretation at issue is consistent with the Department's interpretation of the word "gas" in related legislation. Some deference to the Department's interpretation under *Chevron* is therefore appropriate.

V.

We now must consider whether the Department of the Interior's construction of the 1914 Act is a permissible one. *Sullivan*, 110 S. Ct. at 964. To affirm the Department's decision, we "need not conclude that the agency construction was the only one it permissibly could have adopted," nor must it accord with "the reading [we] would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. Rather, we must determine whether it is " 'rational and consistent with the statute,' " *Sullivan*, 110 S. Ct. at 964 (quoting *NLRB v. United Food & Commercial Workers*, 484 U.S. 112, 123 (1987)), taking into account the fact that a consistent and long-standing administrative interpretation of "gas" *in the 1914 Act* is lacking.

The Department's inclusion of carbon dioxide gas within the 1914 Act's reservations certainly does not offend the statute's plain language, which simply refers to "gas."[18] Plaintiffs attempt to give this word a limiting

[18] Nonfuel gases have been determined to be "gas" within the meaning of various other statutes in the face of arguments that the term "gas" referred only to fuel gas. *See, e.g., Reich v. Commissioner*, 454 F.2d 1157, 1158 (9th Cir. 1972) (geothermal steam is a "gas" within meaning of Internal Revenue Code provision providing depletion allowance for oil and gas wells); *Amoco Prod. Co. v. Wyoming*, 751 P.2d 379, 383 (Wyo. 1988) (term "natural gas" in state excise tax statute includes "all gases that occur naturally in gas produced from drilled wells").

construction through the use of legislative and other historical materials. Our own search through these materials revealed no clear congressional intent to exempt carbon dioxide or any other naturally occurring underground gas from the statutory authorization to reserve "gas." Accordingly, we will defer to the IBLA's interpretation unless it is inconsistent with the purpose and policy of the 1914 Act.

According to plaintiffs, "[t]he purpose of the 1914 Act was to convey all minerals except these carefully enumerated fuel and fertilizer minerals on account of which the land had been specifically withdrawn." Opening Brief at 27. While this characterization is not wholly inaccurate, it is somewhat incomplete. In enacting the 1914 Act, Congress was attempting to accommodate two concerns: (1) to prevent the mismanagement and waste that would occur if certain valuable resources deemed necessary for the country's economic development fell into the wrong private hands, and (2) to fully realize the nation's agricultural potential through the settlement and development efforts of homestead entrants. *See generally United States v. Union Oil Co.*, 549 F.2d 1271, 1274-76 (9th Cir.) (describing events leading to enactment of 1914 Act and related acts), *cert. denied*, 434 U.S. 930 (1977).

Plaintiffs repeatedly point out that, in marked contrast to the Stock Raising Homestead Act of 1916, 43 U.S.C. §§291-302, the 1914 Act reserved only the six enumerated classes of minerals instead of the entire mineral estate. This feature of the 1914 Act presumably resulted from political compromise to overcome the opposition to general reservations by representatives of certain Western states. *See, e.g.*, 51 Cong. Rec. 10493 (1914) (colloquy between Representative Mondell of

Wyoming arguing for limited mineral estate and Representative Mann of Illinois suggesting a general mineral reservation). Plaintiffs extrapolate from this feature of the 1914 Act their argument that its reservations should be very narrowly construed to preserve its purpose to convey a limited mineral estate to the homestead entrant or purchaser of the surface estate.

The short answer to plaintiffs' argument is that a substantial mineral estate passes to the surface holder regardless of how the express reservation of "gas" in the Act is construed. All metalliferous minerals, as well as those nonmetalliferous minerals not enumerated or reserved, pass to the landowner.[19] Moreover, Congress failed to modify the term "gas" in the 1914 Act. Finally, plaintiffs fail to give proper weight to Congress' general purpose to ensure proper management and disposition of the reserved minerals, including gas, by retaining them in the public domain.

Part of this general purpose was to lay the groundwork for the rational disposition of these resources. Accordingly, the 1914 Act provided for "the right to prospect for, mine, and remove the same, such deposits *to be subject to disposal by* the United States only as shall be hereafter expressly directed by law. . . . Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting for the

[19] Plaintiffs hotly dispute intervenors' argument that carbon dioxide gas should be reserved because no specific intent exists to exclude it. This conceptual approach is flawed, plaintiffs contend, because requiring specific intent to exclude would effectively reserve all minerals the exclusion of which is not made clear in the language or the legislative history of the 1914 Act. We disagree. Specific intent to exclude such metalliferous metals as gold, silver and copper, etc. exists because they are *not enumerated in the act.* "Gas," in contrast, *is* enumerated. Intervenors refer, quite obviously, to the absence of specific intent to place a limiting construction on the word gas.

same." 30 U.S.C. §122 (emphasis added). When construing the 1914 Act, the law relating to the conveyancing, prospecting for, and exploitation of the reserved substances should be given due regard. In this respect, at least, analyses relating to similar problems in construing private mineral conveyances are instructive.

In *Northern Natural Gas Co.*, 441 F.2d 704, we considered a question in the context of an "oil and gas" lease closely analogous to the problem we now confront. The landowner lessors there contended that helium, a noncombustible gas, did not pass to the lessee. *Id.* at 710. In rejecting the lessors' contention that only combustible gas was meant by the term "gas," we looked first to determine if the parties had a "specific intent" concerning the disposition of helium gas. We concluded that the parties "could not have had any intent with regard to it," *id.* at 714, because when the leases were entered into, helium was considered an impurity in the natural gas stream. We then tried to determine the parties' general intent. We observed that:

> "General intent should be discovered not by defining and redefining the terms used but by considering the purposes of the grant in terms of enjoyment of the rights created.
>
> ". . . .
>
> "In our opinion general intent is closer to original intent than is specific intent which blossoms when a component previously regarded as an impurity becomes valuable. The discovery of the use and value of a component does not expand the grant but the expansion of that discovery into tangible value makes more certain the specific object of the general grant. We conclude that, absent specific reservations, the grant of gas by the leases covered all components of the gas, including helium."

Id. at 714-15.

The analysis of the leases in *Northern Natural Gas*, maintain plaintiffs, has no application to the construction of a statute such as the 1914 Act. We disagree. The 1914 Act envisioned that the reserved estates eventually could be the subject of conveyances such as leases. Moreover, the leases in *Northern Natural Gas* and the reservations in the 1914 Act each create split mineral estates with unique problems common to both. Finally, at its simplest level the 1914 Act operates to regulate executive conveyances of real property owned by the United States. At bottom, both *Northern Natural Gas* and the dispute here concern what was contemplated in a conveyance of "gas."[20]

We think it fair to say that Congress' general intent in creating the reservation was to put the United States government in a position to convey the same rights a lessor of "oil and gas" could convey to a lessee to enable the latter to "prospect for, mine, and remove the same." 30 U.S.C. §122. Courts consistently have held that a gas lessee, absent an explicit reservation, is entitled to the raw natural gas stream, whatever its chemical makeup. *See Northern Natural Gas*, 441 F.2d at 715; *Navajo Tribe of Indians v. United States*, 364 F.2d 320, 326 (Ct. Cl. 1966).

The analysis in *Northern Natural Gas* and *Navajo Tribe* is nonetheless inapposite, argue plaintiffs, because here the carbon dioxide gas is over ninety-nine percent pure, while in *Northern Natural Gas* and *Navajo Tribe* the noncombustible elements were commingled with the combustible elements. We do not think a rule making

[20] If anything, plaintiffs' distinction between the private conveyances in *Northern Natural Gas* and the federal patent conveyances regulated by the 1914 Act does not favor their position. Land grants are usually construed favorably to the United States. *See Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59-60 (1983).

property rights to different chemical components of natural gas dependent on the level of purity (or impurity) of the gas would aid in the rational development of the law of mineral resource rights. Moreover, as the court in *Navajo Tribe* wrote:

> "Although the parties to the lease may have been thinking mainly of fuel-type gases, it is still more realistic to presume that the grant included not only hydrocarbons but the other gaseous elements as well. It follows that, whether its percentage was high or low, the helium component was part of the 'gas deposit' which passed to the lessee."

Navajo Tribe, 364 F.2d at 326. This reasoning applies equally well to our view of Congress' intent when it reserved "gas" in the 1914 Act.

Other factors influence our conclusion that the Department of the Interior's construction of the 1914 Act is consistent with its purpose. The value of the carbon dioxide gas derives for all practical purposes from its function as a pressurizer and solvent upon being re-injected into "depleted" oil wells. In accord with the 1914 Act's purpose of conserving the nation's fuel resources, reservation of the gas at issue here operates to preserve increasingly scarce domestic sources of fuel. Indeed, a contrary construction would undermine the fuel conservation purpose of the 1914 Act.

Hydrocarbon gas and the carbon dioxide gas here in question also serve parallel functions to some extent, a fact well known during the era of the 1914 Act's enactment. *See* J. Lewis, *Methods for Increasing the Recovery from Oil Sands,* 148 Bureau of Mines Bull. 90, Dep't of the Interior (1917) (concerning reinjection of hydrocarbon gas and other gases into wells as a method to increase oil recovery). Indeed, "[t]he principle of

increasing production [of oil] by forcing air *or any other gas* through the oil sand, and many other details of operation, [were] covered [as of 1917] by U.S. patents." *Id.* at 36 n.a (emphasis added). In *Utilities Prod. Corp. v. Carter Oil Co.*, 72 F.2d 655 (10th Cir. 1934), we held that an oil lessee had the right to use so-called "dry" hydrocarbon gas to increase oil production. We wrote:

> "The use of gas for repressurizing was *so widely known* in the industry by 1917 . . . that the Interior Department had prepared and issued a bulletin of 120 pages on the subject. Repressurizing was in *common use* in the Appalachian fields in *1916.*"

Id. at 659 (emphasis added). To the extent that the value of "gas" derives, or derived, from its utility in oil recovery, its combustibility is irrelevant.

We have no way of ascertaining that Congress was aware of the value of gas in oil recovery, or whether it intended to reserve it for this purpose. However, had Congress been aware of the value of carbon dioxide gas in the recovery of oil, it strains credulity to conclude that Congress would have created the separate gas estates plaintiffs suggest. We therefore conclude that the Department of the Interior's construction of the 1914 Act's reservation of "gas" to include carbon dioxide gas is "reasonable in light of the statutory purpose." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455 (1978).

VI.

The district court's order is AFFIRMED.

Judgment of the United States Court of Appeals for the Tenth Circuit Dated September 20, 1990

SUPREME COURT OF APPEALS
FOR THE TENTH CIRCUIT

88-2349

JOE AULSTON and LOLA AULSTON, HOWARD L. BARTLEY, ELSIE BARTLEY, VIRGINIA BASSETT, ROGER A. BIGLER, Trustee, BARBARA BURKE, TRUSTEE for PAUL WILSON Estate, STANLEY E. BREWER, REGINA BREWER, CHARLES H. BROUGHER, BESSIE C. BROUGHER, RUSSELL D. BROWN, LEON CASSADAY, FLOSSIE E. CASSADAY, FRED G. CLINE, VIRGINIA CLINE, MICHAEL T. COKER, FRANKIE J. COKER, W.T. COKER, EDNA B. COKER, DENVER DALY, FLORENCE DALY, H.L. DUNCAN, THELMA DUNCAN, L.E. FRAKA, WANDA FRAKA, JOE P. FULKS, THELMA B. GARWOOD, RAYMOND G. GERLACH, JANET G. GERLACH, R.C. GERLACH, LOIS GERLACH, JAMES D. HARRIS as General Partner for Harris Limited Partnership, HARRIS LIMITED PARTNERSHIP, HAROLD F. HENSLEY, GEORGE L. HERREN, VIOLA HERREN, OLIVE V. HODAPP, ROBIN R. HOLLEN, Jr., BETTY J. HOLLEN, GLEN C. HUDGEONS, LOIS HUDGEONS, LORETTA B. HUNTER, JERRY HUSKEY, PAT HUSKEY, GARY HUSKEY, CARMEN IVES, IVES FARMS, INC., ROGER D. IVES, SUSAN IVES, SHERYL A. IVES, W.L. LANCASTER, LOIS LANCASTER, LANIER FARMS, INC., ROBERT D. LANIER, personally and

as President of LANIER FARMS., RHODA E. LEGG, IVA LINDBACK, MILDRED MAGGART, O. WAYNE MAGNESS, JEAN MAGNESS, LENA MARRS, OSCAR J. MARTIN, WANETA MARTIN, LAWRENCE MCGRATH, NANCY McGRATH, EDMUND L. MURPHY, CAROLINE MURPHY, ROBERT L. MUSTOE, IVAN W. NEELY, ELIZABETH ANN NEELY, HAZEL J. NEELY, DEE RENAY NEELY, PHYLLIS C. NICHOLS, IRVING L. NORTON, DANA NORTON, LEROY W. OLIVER, ELLEN OLIVER, TROY OLIVER, SHORLENE OLIVER, TOMMY W. PEDIGO, IMA JEAN PEDIGO, GALA FERN POCK, JOHN E. POCK, RITA L. POCK, ALBERT S. PORTER, H.L. POSEY, URSEL PRIBBLE, LOUISE PRIBBLE, CLIFFORD D. RAGSDALE, EDITH L. RAGSDALE, GRADY RAGSDALE, JEAN RAGSDALE, WAYNE A. RAMSEY, GLADYS E. RAMSEY, JOE F. RANDOL, LOIS J. RANDOL, DAISY M. REED, JOHN B. REED, HENRY S. ROWEN, BEVERLY ROWEN, BEATRICE G. SELIG, W.E. SPEER, PATSY SPEER, THERON O. STORY, JIM TEBBS, WILLIAM A. THOMPSON, JR., CLARENCE R. UPTAIN, LULA BELLE UPTAIN, LLOYD S. WALLACE, PAT WARREN, RUBY WARREN, WILLIAM WASCHKE, VIOLET WASCHKE, ERNEST WATKINS, GENEVA WATKINS, BILLY D. WATSON, DONALD H. WHITE, ISABELL M. WHITE, HENRY M. WHITE, GOLDIE WHITE, BRAD E. WHITE, PAMELA KAY WHITE, WAYNE E. WHITE, BESSIE M. WHITE, DOROTHY F. WILBANKS, AARON C. WILLIAMS, ARTHUR WILSON, ESTHER WILSON, MARIE WILSON, CLARA A.

(Additional Plaintiffs-Appellants.)

WOODMANSEE, RODGER D. WORTHY, ELIZABETH ANN WORTHY, ROBERT YOUNG and OLIA YOUNG,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; DONALD HODEL, in his Official capacity as Secretary of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; ROBERT R. BUFORD, in his official capacity as Director of the U.S. Bureau of Land Management; NEIL MORCK, in his official capacity as Colorado State Director of the Bureau of Land Management,

Defendants-Appellees.

SHELL WESTERN E&P, INC.; CONOCO, INC.; VINCENT J. DUNCAN; RAYMOND T. DUNCAN; ELECTRA INVESTMENT; SYNERGY EXPLORATION, CO.; GULF OIL CORP; MOBIL PRODUCING TEXAS/NEW MEXICO; MCO RESOURCES, INC.; ESTATE OF WALTER DUNCAN; TIDELANDS ENERGY CO.; UNIVERSAL RESOURCES CORPORATION; LENDON CO.; DUNCAN ENTERPRISES, INC.; JUSTIN R. MEYER; BARBARA L. MEYER; PHILLIPS OIL CO.,

Intervenors-Appellees.

JUDGMENT
Entered September 20, 1990

Before HOLLOWAY, *Chief Judge*, SEYMOUR, MOORE, *Circuit Judges.*

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court

ROBERT L. HOECKER
ROBERT L. HOECKER, Clerk.

APPENDIX B

Order of the United States District Court
For the District of Colorado
Dated August 4, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-F-1144

FILED
United States District Court
Denver, Colorado
AUG. 4 1988
JAMES R. MANSPEAKER, Clerk

JOE AND LOLA AULSTON, *ET AL.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Defendants,

and

SHELL WESTERN E&P, *ET AL.*,
Intervenors.

ORDER

Sherman G. Finesilver, *Chief Judge*

This matter comes before the court on appeal of a decision by the United States Department of Interior Board of Land Appeals (IBLA). The parties have fully

briefed the issues involved and the case is ripe for final adjudication. The court has reviewed the administrative record, the parties' written submissions and the applicable law. For the reasons stated below, the decision of the IBLA is AFFIRMED.

I.

This case involves a dispute between the United States and plaintiffs over the ownership of carbon dioxide on land situated in Dolores and Montezuma Counties, Colorado. The land is situated near the McElmo Dome (Leadville) Unit. Plaintiffs are patentees or successors of patentees who hold title to the land pursuant to the Act of July 17, 1914, *as amended*, 30 U.S.C. §121. Intervenors are holders of oil and gas leases on the land.[1] Plaintiffs seek judicial review of an IBLA decision affirming a Bureau of Land Management (BLM) determination that the government's reservation of oil and gas on the lands included carbon dioxide. *Robert D. Lanier, et al.*, 90 IBLA 293 (Feb. 20, 1986).[2]

II.

In reviewing an agency's statutory interpretation, we first must determine whether Congress has expressed an intent on the issue. If the statute is silent or ambiguous, we will uphold the agency's interpretation if

[1] We outlined the procedural history of this case in our Order of January 11, 1988. In that order, we denied intervenors' motion to dismiss on statute of limitations grounds. In their brief, intervenors raise this issue again. We affirm our earlier decision.

[2] Plaintiffs are also appealing an IBLA decision entitled *Irving L. Norton, et al.* (November 27, 1987). That decision merely reaffirmed the *Lanier* holding.

it is "based on a permissible construction of the statute." *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 842-43 (1984). A court may not substitute its judgment for the reasonable interpretation of an agency. *Id.* at 844.

Plaintiffs hold title to the lands pursuant to 30 U.S.C. §121 which provides, in relevant part:

> Lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine and remove the same.

The question is whether carbon dioxide is a "gas" within the meaning of the statute and, consequently, whether this interest is reserved to the United States.

The IBLA relied on several factors in reaching its decision. First, it is clear that under the usual definitions, carbon dioxide is a gas, *Lanier,* 90 IBLA at 302. Plaintiffs contend the Act makes a distinction between hydrocarbon and nonhydrocarbon gases. At the time of the Act's passage, Congress was not aware of carbon dioxide's commercial value. Accordingly, no specific intent to exclude carbon dioxide was likely. *Id.* at 302-03.

Plaintiffs essentially argue that Congress' silence on the issue creates a negative inference that carbon dioxide was to be excluded from the statutory definition of

"gas." This contention has been rejected in similar cases. *See Northern Natural Gas Co. v. Grounds,* 441 F.2d 704 (10th Cir. 1971); *Navajo Tribe of Indians v. United States,* 364 F.2d 320 (Ct. Cl. 1966). *Se also Brennan v. Udall,* 251 F.Supp. 12 (D.Colo. 1966), *aff'd,* 379 F.2d 803 (10th Cir.), *cert. denied,* 389 U.S. 975 (1967) (finding that the term "oil" includes oil shale). The IBA agreed with the reasoning of these cases. *Lanier,* 90 IBLA at 306.

The IBLA also found that the Department of Interior has consistently included carbon dioxide as a gas. *Id.* at 307. For example, since 1942, the Department has defined gas as "any fluid, either combustible or noncombustible, which is produced in a natural state from the earth and which maintains a gaseous or rarified state at ordinary temperature and pressure conditions." *See* 43 CFR 3000.0-5(a). Judicial deference to an agency interpretation is particularly compelling when supported by longstanding practice. *King v. Berglund,* 517 F.Supp. 1363, 1368 (D.Colo. 1981).

Another factor we find important is that Congress has never amended the statute to correct the agency's interpretation. This constitutes implicit legislative approval of the Department's construction of the statute. *See Commodity Futures Trading Comm'n v. Schor,* 106 S.Ct. 3245, 3255 (1986). In fact, there is a paucity of evidence indicating Congress even considered this question.

In the absence of clear Congressional intent, we accord deference to a reasonable statutory interpretation. We find the IBLA decision does not violate Congressional intent or the spirit of the statute.

ACCORDINGLY, the IBLA decision finding carbon dioxide to be reserved to the United States is AFFIRMED.

DATED this 4 day of August, 1988, at Denver, Colorado.

BY THE COURT:

SHERMAN G. FINESILVER
Sherman G. Finesilver, *Chief Judge*
United States District Court

APPENDIX C

IBLA Decision

[90 IBLA 293] In Reply Refer To:
(Logo)

United States Department of the Interior

Office of Hearings and Appeals
Interior Board of Land Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

ROBERT D. LANIER, *ET AL.*

IBLA 85-271, 84-814

Decided February 20, 1986

Appeals from separate decisions of the Colorado State Office, Bureau of Land Management, dismissing private contest complaint (Contest No. 722), and denying application for recordable disclaimer of interest in lands, C-39463.

Affirmed.

1. Act of July 17, 1914—Federal Land Policy and Management Act of 1976: Disclaimers of Interest—Homesteads (Ordinary): Mineral Reservation—Oil and Gas Leases: Lands Subject to—Patents of Public Lands: Reservations

   A reservation of oil and gas in lands patented under sec. 1 of the Act of July 17, 1914, *as amended*, 30 U.S.C. §121 (1982), is properly held to include carbon dioxide, a nonhydrocarbon gas produced from a gas well as a component of the naturally formed gases indigenous to the underlying reservoir. Hence, an application for recordable disclaimer of interest in the carbon dioxide filed by the patentee or his successor in interest is properly rejected.

APPEARANCES: Stephen H. Muse, Esq., San Antonio, Texas, for appellants, Ellen V. Gross, Esq., Houston, Texas, Ted P. Stockmar, Esq., and Marla Williams, Esq., Denver, Colorado, for Shell Western E & P, Inc.; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

[90 IBLA 294] OPINION BY
ADMINISTRATIVE JUDGE GRANT

This case involves a dispute between the United States and Robert D. Lanier and others (appellants herein) concerning ownership of the carbon dioxide (CO_2) underlying certain land situated in Dolores and Montezuma Counties, Colorado, which had been patented to appellants or their predecessors in interest pursuant to section 1 of the Act of July 17, 1914, *as amended*, 30 U.S.C. §121 (1982), with a reservation to the United States of deposits of "gas." The land is situated either within or in close proximity to the McElmo Dome (Leadville) Unit, of which Shell Western E & P, Inc. (Shell Western) is the unit operator. Carbon dioxide was discovered underlying appellants' land in the 1950's.

Appellants have appealed from two decisions of the Colorado State Office, Bureau of Land Management (BLM), dated July 27, 1984 (IBLA 84-814), and December 17, 1984 (IBLA 85-271). The appeals were consolidated for decision by order of the Board dated February 19, 1985.[1] In its July 1984 decision, BLM

[1] The names of the appellants, as well as the affected lands, are set forth in Exhibit 1 attached to the December 1984 BLM decision.

dismissed appellants' private contest complaint (Contest No. 722) challenging the claim of the United States to the carbon dioxide underlying appellants' land. In its December 1984 decision, BLM adjudicated appellants' claim to the carbon dioxide in an application for a recordable disclaimer of interest (C-39463) under section 315 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §1745 (1982). The latter BLM decision denied the claim and rejected a request to place revenues from carbon dioxide leases in escrow.

[90 IBLA 295] On January 9, 1984, appellants submitted a "claim" for the rights to the carbon dioxide underlying approximately 20,000 acres of land owned by them.[2] Appellants stated the carbon dioxide is 99 percent pure and occurs in a liquid state. Appellants asserted

[2] BLM states in its December 1984 decision that appellants' amended claim includes 20,931.43 acres, of which 20,043.39 acres were patented under the Act of July 17, 1914, with a reservation of oil and gas to the United States. The lands patented under the 1914 Act are at issue in this appeal. The reasons for rejection of the claim as to the balance of the lands are set forth in footnote 4 below.

Of the lands patented under the 1914 Act, BLM states that 15,742.01 acres are situated within the McElmo Dome (Leadville) Unit. The McElmo Dome (Leadville) Unit embraces a total of 203,234.26 acres in Dolores and Montezuma counties in southwest Colorado, of which approximately 154,638.98 acres contain Federal oil and gas. The decision found all of the land claimed by appellants within the unit to be embraced in existing Federal oil and gas leases. BLM further stated that the "primary purpose" of the unit is to extract carbon dioxide from the Mississippian Leadville formation and to transport it "by pipeline to oil fields in Texas for injection [into existing wells] to aid recovery of the remaining reserves." The BLM decision disclosed that the carbon dioxide was discovered within the unit "about 1950" and "[d]uring the 1970's, Shell Oil Company and Mobil Oil Corporation formed seven exploratory units, [which in turn formed the basis for the present unit,] for [the] development of anticipated CO_2 reserves in the area."

that the United States had improperly leased these rights to Shell Oil Company and others and that the McElmo Dome (Leadville) Unit agreement, dated August 24, 1982, improperly included carbon dioxide in its definition of unitized substances. Appellants requested BLM to "disclaim all right, title and interest" in the carbon dioxide, to account for "all [past] royalty payments or other proceeds from the sale of the carbon dioxide" attributable to their land, and to place future royalty payments or other proceeds in escrow, in accordance with section 28 of the unit agreement. In support of their claim, appellants argued that section 1 of the Act of July 17, 1914, did not authorize the reservation of carbon dioxide to the United States in patents issued under the Act and that the United States did not reserve carbon dioxide when issuing such patents. Appellants submitted numerous documents in support of their arguments.

[90 IBLA 296] On July 3, 1984, appellants filed a private contest complaint pursuant to 43 CFR 4.450, challenging the title of the United States to the carbon dioxide involved herein. Appellants stated that the complaint was "in accordance with the Order of Judge Kane, U.S. District Court for the District of Colorado, dated March 25, 1981." In that order, styled *Dean Ives v. United States*, Civ. No. 80-K-705 (D. Colo. Mar. 25, 1981), the court dismissed a suit challenging the title of the United States to the carbon dioxide involved herein, in part because the plaintiffs had failed to exhaust their administrative remedies by pursuing their claim before the Department of the Interior.

In its July 1984 decision, BLM dismissed appellants' private contest complaint because private contests cannot be brought against the United States under 43 CFR 4.450. BLM also noted the case involved the question of whether carbon dioxide was a reserved mineral under section 1 of the Act of July 17, 1914, which, as a matter of law, was properly resolved in an adjudication of appellants' previously filed "claim."

In the statement of reasons for appeal from the July 1984 BLM decision, appellants state they filed the private contest complaint because they felt constrained to do so by the court order in *Ives*.[3] On August 27, 1984, BLM filed a motion for an extension of time to file an answer to appellants' statement of reasons, noting that BLM would soon issue a decision denying appellants' "claim" and requesting that any appeal from the anticipated [90 IBLA 297] decision be consolidated with the earlier appeal. BLM also recognized appellants were "forced" to appeal the dismissal of their contest complaint in order to avoid being "foreclosed, on the issue of title to carbon dioxide for failure to appeal." On August 31, 1984, appellants filed a response to BLM's motion, essentially acknowledging that their appeal from the July 1984 BLM decision was a protective appeal. In view of the fact that BLM has since acted upon appellants' claim, thus providing an appropriate forum

[3] The court order referred to the private contest regulations at 43 CFR Part 4, Subpart E, in noting the availability of an administrative forum for determining whether carbon dioxide is a gas reserved in a patent under the Act of July 17, 1914, 30 U.S.C. §121 (1982). However, as noted below, we regard appellants' appeal from the December 1984 BLM decision as the appropriate administrative forum for addressing appellants' claim.

for consideration of the essential controversy in the case (*i.e.*, who holds title to the carbon dioxide under the Act of July 17, 1914) and recognizing the inappropriateness of a private contest to quiet title as against the United States (*see* 43 CFR 4.450-1), we hereby affirm the July 1984 BLM decision dismissing appellants' private contest.

In its December 1984 decision, BLM concluded that the United States holds all right, title, and interest to the carbon dioxide in lands patented under the Act of July 17, 1914, by reason of a reservation of oil and gas to the United States. As a basis for the decision BLM relied on two memoranda issued by the Office of the Regional Solicitor, dated July 12, 1979, and July 26, 1984, and a memorandum issued by the Office of the Solicitor, dated July 20, 1984. Treating appellants' respective claims as a single consolidated application for a recordable disclaimer of interest in the carbon dioxide, BLM denied the application.[4] BLM also found that any

[4] BLM further stated the application was properly treated as 140 separate applications, all of which were subject to the "recently issued regulations" set forth at 43 CFR Subpart 1864 (49 FR 35297 (Sept. 6, 1984)), including payment of filing fees and processing costs. However, BLM concluded that appellants would not be required to comply with these regulations, unless they were successful on appeal, because BLM had substantially adjudicated their application prior to promulgation of the regulations.

BLM also noted that, with respect to portions of the claims of particular appellants, the application for a recordable disclaimer of interest was subject to rejection because the United States had either clearly conveyed its mineral interest or retained that interest. BLM stated the following land had been patented with no mineral reservation: lot 2, sec. 4, T. 37 N., R. 19 W., sec. 16, T. 38 N., R. 16W.; and the NE ¼ sec. 1, T. 38 N., R. 19 W., New Mexico

(Footnote continued on following page.)

doubts [90 IBLA 298] regarding the invalidity of appellants' claim were resolved by the "severe administrative consequences" of a finding of validity, noting the Department has "for at least 40 years" considered oil and gas leases to convey carbon dioxide. BLM stated that a finding of validity would, for example, cloud the title of existing leases, especially those held by the production of carbon dioxide, and complicate the issuance of leases where the land underlying portions of those potential leases had been patented under the Act of July 17, 1914. BLM concluded: "Absent a clear, positive basis for a determination that the landowner is the owner of the CO_2, the resulting complications should weigh in favor of ownership by the United States of America."[5] Finally, BLM rejected appellants' request to account for or to place in escrow "revenues attributable to the carbon dioxide in the claimed lands."

(Footnote continued from preceding page.)

Principal Meridian, Colorado. BLM stated the following land had not been patented: W ½ SW ¼ sec. 17, T. 37 N., R. 19 W., New Mexico Principal Meridian, Colorado.

BLM also noted that, with respect to a portion of the claim of one appellant, the patent from the United States had, in addition to reserving oil and gas under section 1 of the Act of July 17, 1914, reserved coal and other minerals under section 9 of the Stock-Raising Homestead Act, *as amended*, 43 U.S.C. §299 (1982). BLM stated this additional reservation was probably due to an inadvertent mistake and it would adjudicate the claim based on the reservation under the 1914 Act. However, it reserved the right to adjudicate the claim under the Stock-Raising Homestead Act. BLM indicated the following land was affected by this dual reservation: SE ¼ NE ¼, N ½ SE ¼ and SE ¼ SE ¼ sec. 8, T. 39 N., R. 19 W., New Mexico Principal Meridian, Colorado.

[5] BLM states that, in view of these complications, it reserves any procedural defenses it may have against appellants' individual claims, including laches, estoppel, or the statute of limitations.

[90 IBLA 299] Section 315(a) of FLPMA, 43 U.S.C. §1745(a) (1982), provides, in relevant part, that the Secretary of the Interior may issue a recordable disclaimer of interest "in any lands * * * where the disclaimer will help remove a cloud on the title of such lands and where he determines * * * a record interest of the United States in lands has terminated by operation of law or is otherwise invalid." Thus, the Secretary, and his delegated representative, BLM, have the discretionary authority to issue a recordable disclaimer of interest if it is determined that certain lands are "not lands of the United States or that the United States does not hold a valid interest in the lands." 43 CFR 1864.0-1. The term "lands" includes "interests in lands." 43 CFR 1864.0-5(e). Hence, BLM may properly consider whether to issue a recordable disclaimer of interest with respect to the carbon dioxide located beneath the lands owned by appellants. The crucial question is whether carbon dioxide was an interest reserved to the United States when it issued patents to the land pursuant to section 1 of the Act of July 17, 1914. This question requires that we examine the meaning of the Act.

[1] Section 1 of the Act of July 17, 1914, *as amended*, 30 U.S.C. §121 (1982), provides, in relevant part, that:

> Lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title *with*

> *a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable,* together with the right to prospect for, mine, and remove the same. [Emphasis added.]

[90 IBLA 300] Section 3 of the Act of July 17, 1914, 30 U.S.C. §123 (1982), provides that the appropriate mineral reservation will also be included in a patent where entry is made prior to classification, withdrawal, or reporting of the lands "as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals." In the present case, the patents to appellants or their predecessors in interest contain a reservation of the oil and gas, in accordance with these statutory provisions. The question, therefore, is whether carbon dioxide comes within the scope of the term "gas" as used in the Act of July 17, 1914.[6]

It is clear that under normal atmospheric pressure and temperature carbon dioxide is a "gas" in the sense that it has neither independent shape nor volume but tends to expand indefinitely. Bureau of Mines, U.S. Department of the Interior, *A Dictionary of Mining, Mineral, and*

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[6] Appellants argue on appeal that the mineral reservation under the Act of July 17, 1914, could only encompass those minerals which, prior to patent, specifically led to the withdrawal, classification, or reporting as valuable of the land embraced therein. There is no evidence that the land involved herein was withdrawn, classified, or reported as valuable on account of carbon dioxide. However, the mineral reservations clearly embrace the term "gas." We must, therefore, presume that the land was either withdrawn, classified, or reported as valuable on account of "gas." The time to challenge the propriety of a reservation contained in a patent is at the time of issuance of the patent. *See Brennan v. Udall,* 379 F.2d 803, 807 (10th Cir.), *cert. denied,* 389 U.S. 975 (1967).

Related Terms 479 (1968) (definition of "gas"); S. B. Talmage and A. Andreas, Carbon Dioxide in New Mexico, (New Mexico Bureau of Mines and Mineral Resources Circular No. 9 (1942)) (Appellants' Brief at Tab 28). However, appellants argue a distinction should be drawn between two types of gas—hydrocarbons and nonhydrocarbons—when interpreting the reservation under the 1914 Act. [90 IBLA 301] In their statement of reasons for appeal, appellants contend that in providing for a reservation of gas under the Act of July 17, 1914, Congress intended only to reserve hydrocarbons which (unlike nonhydrocarbons) may be used as a source of fuel. Appellants recite that certain lands of the United States had been withdrawn from nonmineral entry by petroleum withdrawals in the early days of the 20th century in order to conserve supplies of "mineral fuels" for the benefit of the entire country (Message from the President, dated Feb. 13, 1907, 41 Cong. Rec. 2806-08 (1907) (Appellants' Brief at Tab 15)), but that this had resulted in the closing of millions of acres of land to homestead and other entry. In order to open such land to nonmineral entry, but yet to continue the protection afforded these minerals, appellants point out, Congress enacted the Act of July 17, 1914, and other similar acts, opening the lands to nonmineral entry while reserving these minerals to the United States. *See United States v. Union Oil Company of California*, 549 F.2d 1271, 1274-75 (9th Cir.), *cert. denied*, 434 U.S. 930 (1977).[7] Appellants argue that the reservation in the 1914 Act had the same purpose as the various withdrawals, *i.e.*, to protect

[7] The *Union Oil* case involved an analysis of the scope of the mineral reservation in patents issued under section 9 of the Stock-Raising Homestead Act of 1916, 43 U.S.C. §299 (1982). The opinion of the court provides an illuminating discussion of the background and purpose of the mineral reservations.

"mineral fuels." Appellants also recognize the intent to reserve mineral fertilizers in the 1914 Act. Appellants state that oil, gas, and asphaltic minerals fall into the category of mineral fuels and phosphate, nitrates and potash fall into the category of mineral fertilizers.

In support of their argument that the minerals listed in the Act of July 17, 1914, fall into two basic categories, *i.e.*, mineral fuels and [90 IBLA 302] fertilizers, appellants refer first to a statement by A. A. Jones, First Assistant Secretary of the Interior, in a letter to the Chairman, Committee on Public Lands, U.S. Senate, dated September 16, 1914, recommending passage of Senate Bill 6484 extending the provisions of the Act of July 17, 1914, to Alaska. After discussing the Act of July 17, 1914, and other statutes opening mineral land to agricultural entry subject to a reservation of minerals, First Assistant Secretary Jones stated: "From the foregoing, it appears that Congress has, in the United States proper, inaugurated a definite policy of separate dispositions of surface estates and mineral deposits in certain classes of important fuel and fertilizer minerals. With this general policy, this Department is in hearty accord" (Appellants' Brief at Tab 15).

In further support of their contention that, at the time of passage of the Act of July 17, 1914, both Congress and the Department considered gas to be a hydrocarbon, appellants refer to a Departmental publication in which the term "oil and gas" is used interchangeably with the term "hydrocarbons." George Otis Smith, The Classification of the Public Lands (Geological Survey, U.S. Department of the Interior, Bulletin 537, 1913) (Appellants' Brief at Tab 6). In particular, Survey stated:

"The immediate purpose of the classification of oil and gas land is to withhold from entry all lands containing valuable deposits of fluid hydrocarbons pending the enactment of adequate legislation providing for their disposition." *Id.* at 117.

It appears from the record that at the time of passage of the Act of July 17, 1914, carbon dioxide was recognized as a constituent of natural gas, although it was regarded as an impurity. It is unlikely that Congress [90 IBLA 303] had any specific intent regarding whether the reservation of gas under the Act included a reservation of carbon dioxide since, although carbon dioxide was known to be a component of natural gas, it was not considered to have commercial value.[8]

Courts have had occasion previously to consider whether a conveyance of "gas" encompasses nonhydrocarbon gases. In *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct. Cl. 1966), the court was called upon to determine whether a lease of "oil and gas deposits" on the Navajo Reservation approved by the Assistant Secretary of the Interior in 1923 conveyed the right to produce helium, a noncombustible,

[8] In a letter to the Trans-America Oil Company, dated July 13, 1932, quoted in appellants' brief, Joseph M. Dixon, Acting Secretary of the Interior, stated:

"In August, 1921, the Utah Oil Refining Company drilled a test well on oil and gas prospecting permit, Salt Lake City 026100, on the Farnham Structure in Utah, and at a depth of 3086 feet encountered a flow of approximately twelve million cubic feet per twenty-four hours of practically pure carbon dioxide gas. However, as carbon dioxide gas was considered at that time as of no commercial value, the well was plugged and abandoned at a depth of 3235 feet in January, 1924."

(Appellants' Brief at Tab 26).

nonhydrocarbon gas found to be associated with other hydrocarbon and nonhydrocarbon gases.[9] The court noted first that gases existing in nature do not fall into mutually exclusive categories such as hydrocarbon and nonhydrocarbon. Rather, the various elements are commingled and the hydrocarbon content cannot be produced separately from the other components. *Id.* at 326.

[90 IBLA 304] After noting that the parties to the lease may have been contemplating mainly fuel-type gases, the court found it "more realistic to presume that the grant included not only hydrocarbons but other gaseous elements as well." *Id.* at 326. Hence, the court held that, regardless of whether the percentage of helium content was high or low, the helium component was part of the gas deposit conveyed to the lessee. *Id.* at 326. The court found this holding consistent with the general intent of the parties and rejected lessor's contention that, in the absence of a showing of specific intent to convey helium, the lease included only hydrocarbon gases. *Id.* at 326-37.[10]

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[9] The composition of the gas was set forth in the opinion of the court as follows:

	Percentage
Methane and other hydrocarbons	17.0
Nitrogen	72.6
Helium	7.6
Carbon Dioxide	2.8
	100.0

364 F.2d at 324.

[10] The court also rejected application of the doctrine of *ejusdem generis* (general words following enumeration of specific things are to be construed as including only things of the same kind or class) to find from the lease of "oil and gas" that the term "gas" was limited in scope to hydrocarbons. This is one of the arguments made by appellants in the present case.

In *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir. 1971), the court was called upon to determine whether oil and gas leases in the enormous gas fields of the Hugoton area embracing approximately 33,000 square miles and 21 million acres conveyed the helium produced with the hydrocarbon gas. After quoting the trial court's definition of gas as including any naturally formed aeriform substances indigenous to the underlying reservoir, which aeriform substances include helium, *id.* at 711, the court found the issue to be one of intent. The court rejected the landowners' reliance on the doctrine of *ejusdem generis* to support their claim that helium, a nonhydrocarbon, was not conveyed by the oil and gas leases. The court found the word "gas" to have "equal status" with the word "oil," citing *Navajo Tribe of Indians v. United States*, *supra*.

[90 IBLA 305] The *Northern* court characterized the critical issue as whether general or specific intent controls. The court accepted the trial court finding that gas did not connote helium to the average landowner, that no landowner contemplated helium in granting the right to produce gas, and that the landowner had no intention whatever regarding helium. After finding that helium emerges as a component of the gas produced from a gas well which necessarily comes from the wellhead and into the transmission line with all the gases which make up the entire stream, the court held that general intent would include in the lease all components of the gas produced by the wells, whereas specific intent would embrace only combustible gas. *Northern Natural Gas Co. v. Grounds*, 441 F.2d at 712-14.

The court found that nothing in the leases disclosed an intent to convey only combustible (hydrocarbon) gases and that, if such were the intent of the lessor, it should have been specified. More significantly, the court held that in the absence of lessor's knowledge of the presence of helium at the time of leasing, they could not have had a specific intent and the general intent is dispositive. *Id.* at 714. The court found that the general intent must be determined by considering the purpose of the grant in terms of enjoyment of the rights created, *i.e.*, the desire of the landowners to profit by production of gas from their lands, to which end they gave exclusive leases permitting exploration, development, production, and marketing of gas. After noting that the gas came from the ground with all its components and that wellhead separation of the helium was impractical, the *Northern* court refused to read into the leases a "subjective intent to convey only those components of the gas which comport to a subjective notion of the commercial end uses at the time of lease execution." *Id.* at 715.

[90 IBLA 306] We find the analysis of the courts in the *Navajo* and *Northern* decisions compelling in determining the scope of the reservation of "gas" under the Act of July 17, 1914. Although Congress and the Department were apparently thinking of gas primarily as a hydrocarbon fuel at the time of enactment, there is no limitation of the reservation in the Act to hydrocarbon gas. The fact that carbon dioxide, although recognized as a component of gas, was not perceived to have commercial value, further tends to negate the existence of a specific intent with respect to reservation of carbon dioxide. In the absence of a specific intent to exclude carbon dioxide from the reservation of gas, we must

reject appellants' attempt to read into the Act a "subjective intent to [reserve] only those components of the gas which comport to a subjective notion of the commercial end uses at the time." *Northern Natural Gas Co. v. Grounds, supra* at 715.

This is consistent with the holding of the court in *Brennan v. Udall*, 251 F. Supp. 12 (D. Colo. 1966), *aff'd*, 379 F.2d 803 (10th Cir.), *cert. denied*, 389 U.S. 975 (1967), in examining the applicability of the reservation of oil under the 1914 Act to oil shale. After noting Congress did not specifically address oil shale in passing the Act, the court found that the purpose and history of the Act, viewed in light of the overall policy of Congress regarding separation of mineral and surface rights, leads to the conclusion that the term "oil" was used in its broadest, generic sense which included oil shale. *Id.* at 24-25. Similarly, the term "gas" must be interpreted to include all of the component parts of gas and not only the hydrocarbon content thereof."

[90 IBLA 307] An important additional factor when considering the intent of the withdrawals and the subsequent reservations in agricultural entry patents is the recognition of the fugacious character of oil and gas.

" Appellants seek to distinguish the carbon dioxide deposit in this case from other occurrences of carbon dioxide produced from underground wells on the basis that this deposit is 99 percent pure. The record indicates the remaining content of the gas is nitrogen, 0.9 percent, and methane (a hydro-carbon component of gas), 0.1 percent. Accordingly, appellants argue that the carbon dioxide is not "commingled" with hydrocarbon gas. Although it may be conceded that in this case the hydrocarbon content is so minor as to be insignificant, the deposit remains a naturally formed gas indigenous to the underlying reservoir consisting of several commingled components. The notion that title to an underlying gas reservoir may rest on the results of a "purity test" is properly rejected.

Early cases compared oil and gas to wild animals which are not reduced to ownership until captured. *New American Oil & Gas Mining Co. v. Troyer*, 76 N.E. 253 (1905); *Dark v. Johnston*, 55 Pa. 164 (1867). As a result, steps were taken to protect these fugacious commodities from drainage by adjacent owners, and the waste which resulted from attempts to capture oil and gas before it was captured by others. This being the case, it can reasonably be assumed that when using the term "gas," the intent was to include all mineral deposits of a gaseous nature, rather than to differentiate between hydrocarbon gas and nonhyrocarbon gas.

Further, it is clear that for many years both Congress and the Department have considered a gas lease to convey nonhydrocarbon gaseous components, unless there is an express provision to the contrary. Thus, section 1 of the Mineral Leasing Act of February 25, 1920, which provided for the leasing of oil, gas, and other mineral deposits owned by the United States, expressly reserved to the United States the ownership of and the right to extract helium from all gas produced from leased lands. Mineral Leasing Act of 1920, ch. 85, §1, 41 Stat. 437-38 (codified at 30 U.S.C. §181 (1982)). This Department has previously recognized that, if nonhydrocarbon gases were not [90 IBLA 308] within the meaning of the term "gas," it would not have been necessary to expressly exclude the right to extract helium under Federal oil and gas leases. Ownership of and Right to Extract Coalbed Gas in Federal Coal Deposits, *Solicitor's Opinion*, 88 I.D. 538 (1981).

On May 7, 1936, the Department promulgated regulations implementing the Mineral Leasing Act,

specifically listing "carbon dioxide" as a gas which was subject to leasing, and providing for the payment of royalties on production. Circular No. 1386, 55 I.D. 502, 511, 521 (1936). Moreover, since 1942, the Department has defined gas as "any fluid, either combustible or noncombustible, which is produced in a natural state from the earth and which maintains a gaseous or rarefied state at ordinary temperature and pressure conditions." 30 CFR 221.2(o) (7 FR 4133 (June 2, 1942), currently codified at 43 CFR 3000.0-5(a)). A letter dated July 13, 1932, from Joseph M. Dixon, Acting Secretary of the Interior, to the Trans-American Oil Company (reproduced in Appellants' Brief at Tab 26) confirms that at least since 1928 carbon dioxide was considered to be leasable under the Mineral Leasing Act of 1920:

> In a letter dated June 16, 1928, to Mr. George D. Parkinson of Salt Lake City, Utah, the First Assistant Secretary of the Interior stated that:
>
> > "In my opinion the regulations pertaining to prospecting for oil and gas under the act of February 25, 1920 (41 Stat. 437), would be applicable to prospecting for carbon dioxide gas and in the event of a valuable discovery of such gas a lease would issue in accordance with the provisions, regulations, and royalties pertaining to that act."
>
> On February 4, 1930, the Solicitor of the Department again considered this question and others in connection with the development of carbon dioxide gas for commercial purposes, affirming the former conclusions.

[90 IBLA 309] Thus, we have recognition by Congress that the scope of the term "gas" embraces nonhydrocarbon gases such as helium, as well as the long Departmental history of treating carbon dioxide gas as embraced within an oil and gas lease issued pursuant to the Mineral Leasing Act of 1920. Although not conclusive, this supports a finding that carbon dioxide is within the scope of the gas reservation under the Act of July 17, 1914.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

C. RANDALL GRANT, JR.
C. Randall Grant, Jr.
Administrative Judge

We concur:

FRANKLIN D. ARNESS
Franklin D. Arness
Administrative Judge

R. W. MULLEN
R. W. Mullen
Administrative Judge

Order of the United States Department of the Interior Dated November 27, 1987

United States Department of the Interior

(Seal) OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

November 27, 1987

IBLA 88-22	:	Recordable Disclaimer of Interest
IRVING L. NORTON, et al.	:	C-46048, C-46049
	:	Motion for Expedited Consideration Granted
	:	Decision Affirmed

ORDER

Appellants, Irving L. Norton and Dana Norton, have brought this appeal from a September 18, 1987, decision of the Colorado State Office, Bureau of Land Management (BLM), rejecting their application for a recordable disclaimer of interest in the carbon dioxide in certain lands owned by them. The BLM decision recites that the lands were patented subject to a reservation of oil and gas to the United States pursuant to the Act of July 17, 1914, *as amended*, 30 U.S.C. §121 (1982). Appellants contend carbon dioxide was not encompassed within the scope of the reservation of gas to the United States.

The BLM decision rejected appellants' contention and found that carbon dioxide was reserved to the United States, citing this Board's decision in *Robert D. Lanier*,

90 IBLA 293, 93 I.D. 66 (1986). On appeal, counsel for appellants has filed a motion to expedite consideration of this case. In support of this motion, counsel contends that on the merits this case is identical to *Robert D. Lanier, supra*, and that appellants are seeking to exhaust their administrative remedies as a prerequisite to obtaining judicial review. In consideration of the motion and the grounds stated therein, the motion for expedited consideration is hereby granted. The Board reaffirmed its decision in *Robert D. Lanier, supra*, and, on that basis, the decision of BLM is affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. RANDALL GRANT, JR.
C. Randall Grant, Jr.
Administrative Judge

I concur:

W. PHILIP HORTON
Wm. Philip Horton
Chief Administrative Judge

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